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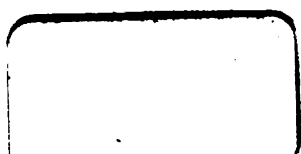
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AN
ESSAY
ON
USES AND TRUSTS,
AND ON THE
NATURE AND OPERATION
OF
CONVEYANCES AT COMMON LAW,
AND THOSE DERIVING THEIR EFFECT
FROM THE STATUTE OF USES.

THIRD EDITION,
REVISED, CORRECTED, AND CONSIDERABLY ENLARGED.

BY FRANCIS WILLIAMS SANDERS, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

VOL. I.
OF USES AND TRUSTS.

LONDON:
PRINTED FOR WILLIAM WALKER,
NO. 196, OPPOSITE ST. CLEMENT'S CHURCH, STRAND.
1813.

TO THE READER.

UPON the publication of a Third Edition of this Work, the Author thinks it necessary to state, that he has rather compressed the matter contained in the first chapter of the first volume relating to Uses before the statute, so as to render the points, which he has taken, more clearly understood; that he has considerably added to the second chapter of the same volume relating to Uses since the statute; and that the principal part of the third chapter relating to modern Trusts, will be found to be entirely new. In the second volume his chief attention has been to add to, and correct, the Precedents. With these alterations and additions, the result of some experience, the Author hopes, that the present edition of his Essay will not be unacceptable to the Profession.

Some references having been made to the second edition, the Author has preserved the paging of it. In those cases, where he refers in this edition to a subsequent page of the work, the reference is to the paging of the second edition; but where the reference is to a preceding page, it is to the paging of this edition.



TABLE OF CONTENTS

OF THE

FIRST VOLUME.

CHAP. I.

OF Uses and Trusts before the Statute 27 Hen. 8. c. 10.

- I. Definition of a Use, 1.
- II. Distinction between Uses and equitable Interests and Trusts not within the Statute 1 Rich. 3. 2, 3.
- III. Introduction of Trusts of a special or transitory Nature, 6.
- IV. Introduction of Uses or permanent beneficial Interests, 14.
- V. History of Uses until the Reign of Richard 3. 15.
- VI. Operation and Effect of the Statute 1 Rich. 3. 22.

Of the Effect of the Alienation of Cestuique Use upon the legal Estate of the Feoffee, when made by Cestuique Use,

in fee-simple,	}	22 to 29.
in fee-tail,		
or for life,		

Of Trusts or beneficial Interests not within the Statute 1 Rich. 3. when declared upon,

Estates tail,	}	29 to 39.
for life,		
for years,		

Legal Estates vested in Grantees, either at common law or by the Stat. 27 Hen. 8. c. 10. 40 to 42.

CHAP. I. *Of Uses and Trusts, continued.*

Of the alienation of Cestuique Use & remainder, &c. 43.

Of leases by Cestuique Use, 44.

Of devises by him, 44.

Of the feoffments, statutes merchant, &c. of Cestuique Use, 44.

VII. The History of Uses, continued, 45 to 47.

VIII. The Statute 23 Hen. 8, c. 10. respecting Charitable Uses, 48.
Construction of it, 49.

IX. The Requisites to be observed in raising Uses, 50.

A person capable of standing seised to a Use, 51,

Privity of estate,

Confidence of person,

} 51 to 54.

A person capable of taking the Use, 54.

A consideration or declaration, 55.

An hereditament, 58.

X. The Properties of a Use, 58.

It was descendible, 59.

devisable, 60.

alienable, 60.

Cestuique Use had neither *jus in re* nor *ad rem*, 60.

He might have been sworn upon an inquest, 62.

The feoffee was complete owner at law, 62.

Uses differed in many instances from cases of possession, 63.

XI. Statute 27 Hen. 8. c. 10. 64.

CHAP. II.

Of Uses since the Statute 27 Hen. 8. c. 10.

- I. The Statute did not abolish the practice of conveying to Uses, 80.
- II. Of the Circumstances necessary to the Execution of Uses, 82.
 - A person seised to a Use or Trust, 82, 83.
 - Of Trusts, not strictly Uses, executed by the Statute, 83 to 86.
 - A Cestuique Use, 86.
 - Not being himself the Grantee to Uses, 86 to 89.
 - Exceptions, 90, 91.
 - A Use in case, 92.
 - Of express Uses, *ibid.*
 - By what words created, 93, 94.
 - Of implied or resulting Uses, 94 to 100.
 - An Hereditament, 100.
 - A Seisin in the Grantee to Uses, 101.
 - Of an actual seisin, co-extensive with the Use, 102.
 - Of the possibility of seisin, or *scintilla juris*, 103 to 107.
 - An actual Conveyance, 107 to 112.
- III. As to the Effect of the Union of the Use and Possession,
 - In respect to the Grantee, 112.
 - In respect to the Cestuique Use, 113.
- IV. Of Limitations, which correspond with the Rules of the common Law,
 - In the creation of Estates for life, 115.
 - in fee-simple, *ibid.*
 - in tail, 116.
 - in common, 118.

CHAP. II. *Of Uses since the Statute 27 Hen. 8. c. 10. continued.*

As to the Cesser of the estate of tenant in tail, during his life, 118.

Fractions in the limitation of Uses, 120.

Uses cannot be limited to abrogate the law, 121.

V. Of the Limitations of Uses, and Creation of legal Estates by the Statute, which differ from the Rules of the common Law.

Of Uses limited to, and legal Estates vested in, Grantors by their own conveyances, 121.

Of Uses limited to the heirs of the body, or right heirs, of the Grantor, so as to take by descent or purchase, 123 to 127.

Of limiting the Use, by the *habendum*, to a person not named in the premises of a deed, 127.

Of Uses limited *in futuro*, and to persons not *in esse*, when no particular estate is expressly limited, 128 to 139.

In what cases these future Uses arise as remainders or springing Uses, 130 et seq.

Of springing Uses after, or upon, a previous limitation in fee-simple, 136.

In what cases these springing Uses may be destroyed, 137 to 142.

Of springing Uses upon, or after, a previous limitation in tail or for life, 142.

Of the distinction between shifting Uses and conditional limitations, 142 to 146.

Tenant in tail may bar shifting Uses, 146.

Within what period a shifting Use must take effect, 146.

Of shifting or springing Uses, arising upon the execution of a power, 148.

They must arise out of a seisin, not clothed with a legal estate at the common law, 149 to 155.

CHAP. II. Of Uses since the Statute 27 Hen. 8. c. 10. continued.

As to the priority of powers of leasing, &c. 158 to 162.

Powers collateral, 163.

relating to the land, 164.

appendant, 164.

in gross, 166.

VI. Effect of the Statute of Uses upon the Laws of Remitter,
168 to 173.

VII. Of the Declaration of Uses, 173.

Who may declare Uses?

The king,

The queen,

Idiots,

Infants,

} 176.

Baron and Feme, 178 to 180.

Tenant for life, and remainder-
man, 180.

In what case a first declaration shall be controlled
by a second, 181 to 190.

When there are contradictory declarations of the
Use in the same conveyance, 190.

The construction upon, and effect of, the declara-
tion, 191.

No formal words are necessary,
ibid.

It must be certain, 192.

No consideration necessary, ibid.

Where it breaks the descent, ibid.

VIII. Of Uses and Trusts which are not executed by the Statute,
193.

Contingent Uses, 194 to 203.

Uses limited of copyhold estates, 203.

Devises to Uses, ibid.

Trusts to pay the profits, convey the estate, &c.
206.

CHAP. III. *Of Trusts since the Statute 27 Hen. 8. c. 10. continued.*

Extent of the legal estate vested
in Trustees, under, or in conse-
quence of, trusts of this descrip-
tion, 207 to 210.

Terms of years and other chattel interests, 210,
Use upon a Use, 211,

CHAP. III.

Of Trusts since the Statute 27 Hen. 8. c. 10.

- I. The Introduction and System of Trusts since the Statute, 212.
- II. Definition of the several kinds of Trusts, 214.
 - Difference between a Trust and Equity of Re-
demption, 214.
- III. In what cases Trusts are governed by, or similar to, the Laws
relative to the legal Estate, 215.
 - Limitations of Trust Estates, 216.
 - Estates tail, 216,
 - Descent of Trust Estates, 217,
 - Trust Estates may be aliened, 218.
 - devised, *ibid.*
 - Execution may issue upon the Trust estate, *ibid.*
 - But not upon the Trust of a term
of years, or equity of redemp-
tion, 219.
 - The Trust Estate is assets to pay debts, 220,
 - Is subject to an extent from the
crown, 221.
 - Is forfeited by the treason of Ces-
tuique Trust, 222,

CHAP. III. Of Trusts since the Statute 27 Hen. 8. c. 10. continued.

An equitable Estate, is comprised under the word Hereditament, in the construction of an act of parliament, 223.

The Trust Estate is subject to curtesy, 224.

The Trust Estate is protected in equity from dormant claims, by analogy to the Statutes of Limitations, *ibid.*

IV. In what cases Trusts differ from legal Estates, 225.

As to dower, 225.

escheat, 226,

The effect of length of time, as between the Trustee and Cestuique Trust, 226.

Fine and non-claim between them, *ibid.*

Terms attendant upon the inheritance, 228 to 234.

Conversion of real into personal estate, and personal into real estate, 234 to 241.

Mergers of equitable interests, 241 to 246.

V. Of Trusts executed and Trusts executory, 246.

As arising upon marriage articles, } 246 to 250.
wills,

VI. Of Declaration of Trusts, pursuant to the Statute 29 Car. 2. c. 3. s. 7. 250.

In respect to the form of the declaration, 251.

In respect of the words of it generally, 252.

As to the operation of particular words, such as rents and profits, 253.

VII. Resulting and constructive Trusts, 254.

Constructive Trusts arising from notice, 255.

Where an estate is purchased in the name of one, and the consideration-money paid by, or on account of, another, 257,

Parol evidence, 259, 260.

Exceptions, 261.

Where the express declaration extends to a part only of the land or interest, 263.

Renewal of a lease by a Trustee, Guardian, or Tenant for life, 267,

CHAP. III. *Of Trusts since the Statute 27 Hen. 8. c. 10. continued.*VIII. *Of Trusts, as more immediately referring to the Person and Acts of Cestuique Trust,*

Who may be a Cestuique Trust, 271.

Actions and suits by Cestuique Trust, *ibid.*

Cestuique Trust may vote at an election, 272.

Conveyances by Cestuique Trust, 272.

by Cestuique Trust in fee-simple, 273.

in tail, or being a
married woman,
273.

for life, 276.

IX. *Of the Trustee, his Estate and Office.*

Who may be Trustees, 277.

Of incumbrances of, and forfeitures by, the Trustee, 278.

Conveyances by Trustees, being infants, &c. 281.

7 Anne, c. 19. and the construction upon it.

39, 40 Geo. 3. c. 88. s. 12,

47 Geo. 3. sess. 2. c. 24,

4 Geo. 2. c. 16.

Conveyances by Trustees, not incapacitated,

by will, 285 to 287.

by deed, 287.

Of purchases by the Trustee of the Trust Estate,
288.

Suits by him, 289.

Releases and compositions by him, *ibid.*He cannot alter the nature of the Trust Estate,
290.His laches will not (generally) prejudice Cestuique Trust, *ibid.*

He cannot vary securities without an express power, 291.

When guilty of breach of trust in complying with,
or exceeding, the letter of the Trust, 292.

CHAP. III. *Of Trusts since the Statute 27 Hen. 8. c. 10. continued.*

When liable to accidental losses, 294.

To preserve contingent remainders, *ibid.*

He may concur in barring the intail, 295.

But he is not to convey a fee-simple to Cestuique
Trust in tail, *ibid.*

Allowances to Trustees for their care, 297.

for their expenses, 299.

When Cestuique Trust shall be liable to a breach
of the Trust, 299.

The Trustee only chargeable for what he has ac-
tually received, 300.

APPENDIX.

No. I. Proviso, shifting the Use upon Neglect, or Refusal, to take
a Name, and bear certain Arms, 301.

No. II. Proviso for shifting the Use upon the Accession of another
Estate, 306.

No. III. (a.) Power to lease for twenty-one Years in Possession, at
Rack-rent, 308.

(b.) Power to lease for three Lives in Possession, or Rever-
sion, at ancient or accustomed Rents, 309.

No. IV. (a.) Power enabling Tenant for Life in Possession to limit a
Rent-charge by way of Jointure, 312.

(b.) Power enabling successive Tenants for Life, in Remain-
der, to limit Rents-charge by way of Jointure, 314.

No. V. (a.) Power enabling Tenant for Life in Possession to charge
for younger Children's Portions, 319.

(b.) Power enabling successive Tenants for Life in Remain-
der to charge for younger Children's Portions, 322.

No. VI. Power of selling and exchanging.



Names of CASES cited in the First Volume.

ABINGDON and Godolphin, 125.
217.

Abbot of Bury v. Bokenham, 53.

Abney v. Miller, 268.

Abraham v. Twig, 116.

Adams v. Savage, 98. 134. 135.

Addenbroke and Cross, 236.

Addington v. Can, 218.

Aggas v. Pickerell, 227.

Albany's Case, 163.

Allen and Bush, 206.

Allen v. Sayer, 291.

Allington and Boteler, 274.

Alston and Taylor, 260.

Altham v. Anglesey, 87. 96.

Ambrose v. Ambrose, 251.

Andrews and Back, 262.

v. Partington, 293.

Anglesey and Altham, 87. 96.

Annealey, in the matter of, 298.

Anonymous, 93. 178. 225. 253. 254.

236. 276. 282. 289. 292. 294.

Appowell v. Monnoux, 114.

Archer and Lamb, 130.

Argol v. Cheney, 97. 181.

Armstrong v. Wolsey, 95.

Ashburner and Fletcher, 234. 239.

Ashdown and Stileman, 262.

Ashley and Harvey, 278.

Ashton and Trafford, 254.

Aston and Harvey, 236.

Astrey and Langton, 255.

Attorney-general v. Whorewood, 50.

v. Crofts, 222.

v. Sands, 221. 229.

Attorney-General v. Wansey, 267.

v. Buller, 286.

v. Vigor, 286.

v. Pawlett, 214.

Audley's Case, 98. 108.

Back v. Andrews, 262.

Baden v. Pembroke, 236.

Bagshaw v. Spencer, 206. 209. 248.

Baines v. Dixon, 253.

Bainton's Case, 108.

Baker and Hunt, 216.

Baldwere and Roe on dem. Crow,
193.

Baldwin and Garth, 216.

Bale v. Coleman, 217. 249.

Ball and Watts, 224.

Ballet and King, 221.

Balsh v. Hyham, 299.

Banbong and Lusher, 178.

Banks and Mills, 253.

Bannister and Le Maistre, 253.

Barnes and Harris, 134.

v. Crow, 271.

Baron and French, 298.

Barry and Leigh, 300.

Barton's Case, 138.

Barwick's Case, 128.

Baskevill's Case, 24.

v. Baskevill, 250.

Bassett and Morgan v. Manxell, 29.
60.

Bastard v. Proby, 248.

Bate and Kenworthy, 115.

Bateman v. Bateman, 262.

- Bateman (Lord) *and* Stevens, 246.
 Bates *v.* Dandy, 218.
 Bateson *and* Betnam, 93.
 Beauclerk *v.* Mead, 236.
 Bearcroft *and* Geary, 279.
 Beaudley *v.* Brook, 101.
 Beckford *v.* Wade, 225.
 Beckwith's Case, 95. 180.
 Bedford's (Earl of) Case, 126.
 Belcher *and* Green, 253.
 Belchier (ex parte), 294.
 Bellamy *v.* Burrow, 251.
 Bennet *v.* Brownlow, 220.
 Bennet *v.* Davies, 278. 288.
 Benson *v.* Hodson, 146.
 Berkley's Case, 33.
 Bernard *and* Sprange, 253.
 Bessett's Case, 174.
 Best *and* Stratton, 118. 128.
 v. Stamford, 229.
 Betnam *v.* Bateson, 93.
 Bevant *v.* Pope, 279.
 Beverley *v.* Beverley, 274.
 Biddulph *v.* Biddulph, 236.
 Bickerston *and* Ryder, 294.
 Bindon *and* Sweetapple, 236.
 Bingham's Case, 125.
 Bishop of London *and* Hill, 253.
 264. 266.
 Blacket *and* Saville, 166.
 Blake *v.* Foster, 29.
 Blakeney *and* Bostock, 291.
 Bland *v.* Bland, 253.
 Blitheman *v.* Blitheman, 110.
 Blue *v.* Marshall, 290.
 Blyth *and* Colgate, 178.
 Boehm *and* Trafford, 292.
 Bokenham *and* Abbot of Bury, 53.
 Bonithorn *v.* Hockmore, 298.
 Booth *and* Trelawney, 236.
 Bonny *v.* Ridgard, 227.
 Boscawen *and* Herle *v.* Cooke, 113.
 Bostock *v.* Blakeney, 291.
 Boswell *and* Glenorchy, 248.
 Boteler *v.* Allington, 274.
 Bottomley *v.* Fairfax, 225.
 Bould *v.* Wynston, 138.
 Bournford *and* Sanders, 241.
 Bovey *v.* Smith, 256.
 Bowater *v.* Elly, 274.
 Bowes (ex parte), 286.
 Bowman *and* Dobbins, 149.
 Boydell *v.* Walthall, 93.
 Boys *and* King, 54. 83.
 Brace *and* Leigh, 116.
 Bradish *v.* Gee, 237. 240.
 Bramble *and* Crabtree, 237. 239.
 Braybrooke *v.* Inskipp, 285, 286.
 Brent's Case, 12. 14. 86. 139, 140,
 141.
 Brettell (ex parte), 286.
 Bridges *and* Kingdom, 261.
 Bristol (Countess of), *v.* Hunger-
 ford, 264.
 Brook *and* Beaudley, 101.
 Brooke *and* Parker, 257.
 Brooking *and* Crooke, 252.
 Brookes *and* Starkey, 264.
 Broughton *v.* Langley, 92.
 Brown *and* Wareham, 253.
 and Goodrich, 275.
 and Lee, 293.
 Browne *and* Duke of Norfolk, 267.
 Brownlow *and* Bennett, 220.
 Brydges *and* Philips, 275.
 Buckeridge *and* Long, 87.
 Buckle *and* Cannell, 178.
 Buckler *v.* Symons, 111.
 Bulkeley *and* Reni, lessee of Hall,
 165.
 Buller *and* Tuckfield, 282.
 and Attorney-general, 286.
 v. Waterhouse, 158.
 Burden *v.* Kennedy, 219.

Burgess *v.* Wheate, 226. 231.

Burland *and* Bushell, 175.

Burnaby *v.* Griffin, 276.

Burrow *and* Bellamy, 251.

Bury *and* Whetstone, 276.

Bush *v.* Allen, 206.

and Jevon, 289.

Bushell *v.* Burland, 175.

Butler *v.* Butler, 293

Byron *and* Pryce, 289.

Cadogan (Lord) *and* Duke of Richmond, 250.

Calthorp's Case, 56.

Callard *v.* Callard, 94.

Campbell *v.* Walker, 288.

Can *and* Adlington, 218.

Cannell *v.* Buckle, 178.

Carew *and* Lloyd, 137.

Carlisle *and* Lechmere, 236.

Carlton *and* Lowther, 256.

Carpenter *v.* Carpenter, 274.

Carr *v.* Elliston, 239.

Cartaret *v.* Cartaret, 295.

Carter *and* White, 248

Caruthers *v.* Caruthers, 178.

Carwardine *v.* Carwardine, 131.

Casborne *v.* Inglis, 279.

Casborne *v.* Scarfe, 224.

Cator *and* Goodright, 161. 165.

Chaloner *and* Horsley, 294.

Chambers *v.* Goldwin, 298.

Champernoon *and* North, 274.

Champion (ex parte), 291.

Chandos *v.* Talbot, 241.

Chansey *and* George, 289.

Chaplin *v.* Chaplin, 211. 224.

Chapman *and* Richardson, 252.

Cheney *and* Argol, 97. 181.

v. Hall, 186.

Chester *v.* Willis, 242

Chichester *and* Raw, 268.

Chirton's Case (Walter de), 222.

Chitters *and* Hartwell, 221.

Cholmley *v.* Humble, 119.

Chudleigh's Case, 105, 106. 140.

141. 194. 198.

City of London *v.* Garway, 264.

Clarke *and* Dawson, 267.

Clay *and* Smith, 225.

Clemence *and* Lynch, 272.

Clifton *v.* Lombe, 252.

Clockmakers Company *and* Sonley, 278.

Cloudsley *v.* Pelham, 252.

Clough *v.* Clough, 178.

Coade *and* Williams, 267.

Cogan *v.* Cogan, 142.

Colebrooke's Case, 289.

Coleman *and* Bale, 217. 249.

Coles *v.* Trecothick, 289.

and Hunt, 220.

Colgate *v.* Blythe, 178.

Collett *v.* Collett, 296.

Colt *v.* Colt, 225.

Cook *v.* Duckenfield, 266.

Compton *v.* Oxenden, 242. 244.

and Squire, 229.

Cooke *v.* Guava, 264.

v. Boscaven *and* Herle, 113.

v. Cooke, 230.

Cooper *v.* Franklyn, 85, 86.

Cooth *v.* Jackson, 259.

Coppin *v.* Fernyhough, 268.

Corbett's Case, 115. 119.

Cordwell *v.* Mackaril, 257.

Cornbury *v.* Middleton, 218.

Cornwallis *and* Digby, 271.

Cosen *and* Tippin, 125.

Cottingham *v.* Fletcher, 252, 253.

263.

Cotton and Johnson, 178.
 Cowper v. Franklin, 8a. 85. 86.
 Cox's (Sir Charles) Case, 221.
 Coysegans (ex parte), 272.
 Crabtree v. Bramble, 237. 239
 Crawley's Case, 24. 103.
 Crisp and Swinnock, 293.
 Crofts and Attorney-general, 222.
 Croker v. Trevithin, 119.
 Cromwell's Case, 211.
 Crooke v. Brookings, 252.
 Crop and Suggess, 275.
 Cross v. Addenbroke, 236.
 v. Hudson, 167.
 Crossing v. Scudamore, 111.
 Crow and Barnes, 271.
 Cuming and Robinson, 274.
 Cunliffe v. Cunliffe, 253.
 Cunningham v. Moody, 236.
 Cusack v. Cusack, 247.
 Cutler and Goodwin, 251.

 Dacre's Case, 7.
 Dalton and Sanback, 211.
 Danby v. Danby, 241.
 Dancer and Ebrand, 261.
 Dandy and Bates, 218.
 Daniels v. Davison, 255.
 Darcy v. Hall, 290.
 Dartmouth (Earl of) and Howe,
 291.
 Davidson v. Foley, 264.
 Davies and Bennett, 278. 288.
 v. Speed, 131, 132.
 Davis's Case, 23.
 v. King, 253.
 v. the Earl of Strathmore,
 255.
 Davison and Daniels, 255.
 Dawson v. Clarke, 267.
 Dean and James, 268.

Deg v. Deg, 252. 259.
 Dehew and Saunders, 255.
 Delamere's Case, 26, 27, 28. 32. 43.
 De la Motte and the King, 222.
 Denne and Walker, 235.
 Derivall and Dowse, 230.
 Digby v. Cornwallis, 271.
 v. Legard, 265.
 Digge's Case, 163.
 Dighton and Lane, 251. 258. 259.
 Dillon v. Fraine, 140, 141. 194.
 Dix and Hore, 108. 204.
 Dixon v. Saville, 225.
 and Baines, 253.
 Dixwell and Roberts, 206. 248.
 Dobbins v. Bowman, 149.
 Dodwell and Gosselin, 293.
 Doe v. Henegage, 120. 147.
 v. Staples, 271.
 dem. White v. Simpson, 207.
 Otley v. Manning, 256.
 Dolland and Lyster, 219.
 Donistherpe and Wife v. Porter,
 242.
 Dowding and Morecroft, 251.
 Dowman's Case, 174.
 Downes and Pollard, 271.
 Dowse v. Derivall, 230.
 Drewry v. Woodliff, 98. 140.
 Duckenfield and Cook, 266.
 Duke of Norfolk and Browne, 276.
 Duncomb v. Wingfield, 170.
 Dunn v. Green, 274.
 Durnford v. Lane, 172.
 Dyer v. Dyer, 260, 261.
 Dymock and Young, 88.

 Eales v. England, 252. 282.
 Ears v. Snow, 120.
 Earle and Senhouse, 227.
 Earlom v. Saunders, 239. 290.

Ebrand *v.* Dancer, 261.
 Edwards *v.* Freeman, 109.
 v. Slater, 166.
 v. Countess of Warwick,
 236.
 v. Moore, 258.
 v. Lewis, 268.
 Effingham (Lord) *and* Lord Ports-
 mouth, 226.
 Ekins *and* Green, 248.
 Elliot *v.* Elliot, 262.
 Elliston *and* Carr, 239.
 Elly *and* Bowater, 274.
 Else *v.* Osborn, 125, 294.
 England *and* Eales, 252, 281.
 Eressey *and* West, 250.
 Errington *and* Read, 95, 125.
 Estoffe *v.* Vaughan, 112.
 Eure *v.* Howard, 92.
 Eustace *and* Kildare, 278.
 Evelyn *v.* Evelyn, 253.
 and Stonehouse, 265.
 Fairfax *and* Bottomley, 225.
 Fausset *and* Whitfield, 112.
 Fawcett *v.* Lowther, 217.
 Featherstonhaugh *v.* Fenwick, 268.
 Fenhouillet *and* Scott, 230, 231, 232.
 Fenton *and* Wells, 128.
 Fenwick *v.* Mitford, 125.
 and Featherstonhaugh, 268.
 Fernyhough *and* Coppin, 268.
 Ferrers *and* Nightingale, 97, 177, 181.
 Finch *v.* Finch, 261.
 Fletcher *and* Makepeace, 116, 117.
 and Tregame, 189, 190.
 and Cottingham, 252, 258.
 263.
 v. Ashburner, 234, 239.
 Flexney *and* Killick, 268.
 Fordyce *v.* Willis, 251.
 Foley *and* Lingen, 253.

Foley *and* Davidson, 264.
 Foster *and* Jerdon, 283.
 and Blake, 39.
 v. Romney, 116.
 Foy *v.* Hynde, 144.
 Franklin *v.* Green, 293.
 Frankline *and* Cowper, 82, 85, 86.
 Freeman *and* Edwards, 109.
 French *v.* Baron, 298.
 Fraine *and* Dillon, 140, 141, 194.
 Fulham *v.* Jones, 236.
 Garnett *and* Pierson, 253.
 Garth *v.* Baldwin, 216.
 Garway *and* the City of London,
 264.
 Geary *v.* Bearcroft, 279.
 Gee *and* Bradish, 237, 240.
 George *and* Pyc, 255, 294.
 v. Chansey, 289.
 Gibson *v.* Rogers, 209, 253.
 Gilbert *and* Ivy, 253.
 Girland *v.* Sharp, 88.
 Glenorchy *v.* Boswell, 248.
 Glubb *and* Slocombe, 177.
 Glyn *and* Harding, 253.
 Godolphin *v.* Abingdon, 125, 217.
 Godwin *v.* Winsmore, 225.
 Goldwin *and* Chambers, 298.
 Goodrich *and* Shedden, 267.
 v. Brown, 275.
 Goodright *v.* Cator, 161, 165.
 v. Mead, 186, 187.
 v. Sales, 230.
 Goodtitle *dem.* Jones *v.* Jones, 39.
 233.
 v. Stokes, 118.
 Goodwin *v.* Cutler, 251.
 Goodwyn *v.* Lister, 282.
 Gore *v.* Gore, 134, 135.
 Gosselin *v.* Dodwell, 293.
 Gower *v.* Grosvenor, 250.
 b 2

Graves *and* Ratcliffe, 221.

Gray *v.* Gray, 261.

Green *v.* Smith, 236.

v. Ekins, 248.

v. Stephens, 250.

v. Belcher, 253.

and Dunn, 274.

and Franklin, 293.

Greenbank *and* Hearle, 224.

Greenhill *v.* Greenhill, 218.

Greswold's Case, 124.

Griffin *and* Burnaby, 276.

Grosvenor *and* Gower, 250.

Guavas *and* Cooke, 264.

Guidot *v.* Guidot, 236.

Gwam *v.* Roe, 87. 158.

Gyles *and* Moysc, 123.

and Oliver, 191.

Halcot *v.* Markant, 259.

Halfpenny's Case, 54.

Hales *and* Hithersell, 299.

Hall *and* Cheney, 186.

and Wheate, 164. 249.

and Darcy, 290.

Hampton *and* Stockman, 112.

v. Spencer, 252.

Harding *v.* Glyn, 253.

Hardy *v.* Reeves, 257.

Hare *and* Haverhill, 189.

Harland *v.* Trigge, 253.

Harris *v.* Barnes, 134.

Harrison *v.* Harrison, 291.

Harton *v.* Harton, 210.

Hartwell *v.* Chitters, 221.

Harvey *v.* Ashley, 178.

v. Ashton, 236.

Harwell *v.* Lucas, 145.

Haverhill *v.* Hare, 189.

Haverington's Case, 180.

Hawkins *and* Wynne, 253.

Hawley *and* Thornton, 236.

Hayter *v.* Rod, 230.

Hayward *and* Page, 146.

Hearle *v.* Greenbank, 224.

Heatley *v.* Thomas, 275.

Heneage *and* Doe, 120. 147.

Henry *v.* Purcell, 206.

Heron *v.* Heron, 259.

Hewit *v.* Wright, 237.

Hibbart *and* Smith, 283.

Hill *v.* Bishop of London, 253. 264.
266.

Hinchinbroke (Lord) *and* Lord
Shipbrook, 300.

Hinton *v.* Hinton, 279.

Hithersell *v.* Hales, 299.

Hobart *and* Stamford, 250.

Hockmore *and* Bonithorne, 298.

Hodges *and* Legard, 252.

and O'Herlihy, 270.

Hodsden *v.* Lloyd, 252.

Hodson *and* Benson, 146.

Hoe *and* Piers, 99.

Holland *and* Rawley, 98. 135.

v. Hughes, 291.

Holloway *v.* Pollard, 111.

Holt *v.* Holt, 268.

Honor *v.* Honor, 248.

Hopkins *v.* Hopkins, 264.

Hore *v.* Dix, 108. 204.

Horsley *v.* Chaloner, 294.

Hoskins *and* Woodhouse, 294.

Houghton (ex parte), 258.

Howard *and* Eure, 92.

Howe *v.* Earl of Dartmouth, 291.

Hudson *and* Cross, 167.

and Otway, 274.

Hughes *and* Oldham, 258.

and Holland, 291.

(ex parte), 288.

Huish *and* Morca, 275.

Humble *and* Cholmley, 119.

Hummerston's Case, 93.
 Hungerford *and* Countess of Bristol,
 264.
 Hunt *v.* Baker, 216.
 v. Coles, 220.
 Huntingdon *v.* Mildmay, 112.
 Hussey's (Sir John) Case, 59.
 Hyham *and* Balsh, 299.
 Hynde *and* Foy, 144.

 Jackson *and* Cooth, 259.
 v. Jackson, 292.
 James *v.* Dean, 268.
 (ex parte), 288.
 Jasper *and* King, 141.
 Jekyll *and* Williams, 84.
 Jenkins *v.* Young, 88.
 Jerdon *v.* Foster, 283.
 Jermin *and* Whitwick, 236.
 Jevon *and* Noel, 279.
 v. Bush, 289.
 Johnson *v.* Cotton, 178.
 and Newman, 253.
 Jones *and* Goodtitle dem. Jones, 39.
 233.
 v. Morley, 188.
 v. Morgan, 217.
 v. Rensbie, 217.
 v. Fulham, 236.
 v. Langton, 247.
 v. Nabbs, 252.
 v. Lewis, 294.
 v. Say *and* Sele, 207.

 In the matter of Annesley, 298.
 English *and* Casborne, 279.
 Inskipp *and* Braybrooke, 285, 286.
 Inwood *v.* Twine, 290.
 Ischam *v.* Morris, 228.
 Ivy *v.* Gilbert, 253.

 Keble *v.* Thompson, 300.

Keech *v.* Sandford, 268.
 Kemp *and* Whately, 248.
 Kennedy *and* Burden, 219.
 Kenworthy *v.* Bate, 115.
 Keymish *and* Thomas, 242, 244.
 Kildare *v.* Eustace, 278.
 Killick *v.* Flexney, 268.
 Kinder *v.* Miller, 259.
 King *v.* Boys, 54, 83.
 v. Jasper, 141.
 v. Marissal, 219.
 v. Ballet, 221.
 v. De la Motte, 222.
 v. Smith, 233.
 and Davis, 253.
 v. Marquis of Stafford, 116.
 Kingdom *v.* Bridges, 261.
 Kirk *v.* Webb, 252, 258, 259.
 Kirkham *v.* Smith, 274.
 Kirkman *v.* Miles, 236.
 Knight *v.* Plymouth, 294.
 Knowles *and* Wilmot, 190.

 Lacy (ex parte), 288.
 Lake *v.* Thomas, 227.
 Lamb *v.* Archer, 130.
 Lamplugh *v.* Lamplugh, 100, 254.
 260, 262.
 and Shortridge, 95, 96.
 Lane *and* Durnford, 178.
 and Pearson, 238.
 v. Dighton, 251, 258, 259.
 Langley *and* Broughton, 92.
 Langhton *and* Jones, 247.
 Langton *v.* Astrey, 255.
 Lawrence *and* Whitchote, 288.
 Leak *and* Randall, 204.
 Leaper *v.* Wroth, 156.
 Lee *v.* Brown, 293.
 Leeds (Duke of) *v.* Munday, 286.
 Legard *v.* Hodges, 252.
 and Digby, 265.

- Legate *v.* Sewell, 249. 274.
 Lechmere *v.* Carlisle, 236.
 Leigh and Young, 295.
 v. Barry, 300.
 v. Brace, 116.
 Le Maitre *v.* Bannister, 253.
 Le Neve *v.* Le Neve, 255.
 Lench *v.* Lench, 260.
 Leonard *v.* Earl of Sussex, 248.
 Leisley's Case, 270.
 Lethicullier *v.* Tracy, 276.
 Leuson and Wilkes, 99.
 Lewing's Case, 176.
 Lewis and Edwards, 268.
 and Jones, 294.
 Lincoln College's Case, 113.
 Lincoln and Duke of Newcastle,
 250.
 Lingen *v.* Sowray, 236. 237.
 v. Foley, 253.
 Lister and Goodwyn, 282.
 v. Lister, 288.
 Littleton and Wingfield, 94. 108.
 Lloyd *v.* Carew, 137.
 and Hododden, 252.
 v. Spillet, 258. 267.
 v. Read, 262.
 Lock and Twisden, 250.
 Lombe and Clifton, 252.
 Long *v.* Buckeridge, 87.
 and Reynell, 112.
 Lower and Weale, 131.
 Lowther and Fawcett, 217.
 v. Carlton, 256.
 Lucas *v.* Lucas, 123.
 and Haswell, 145.
 Lusher *v.* Banhong, 178.
 Lynch *v.* Clemence, 272.
 Lyster *v.* Dolland, 219.

 Mackaril and Cordwell, 257.
 Mackreth *v.* Symmons, 255.

 Makepeace *v.* Fletcher, 116, 117.
 Mandeville's Case, 133.
 Manning and Doe dem. Otley,
 256.
 Manory and Southcoat, 190, 191.
 Mansell *v.* Mansell, 295.
 Mansfield's Case, 176.
 Manxell and Bassett and Morgan, 29.
 60.
 Marrisal and King, 219.
 Markant and Halcot, 259.
 Marlow *v.* Smith, 255. 286.
 Marriott and Taster, 268.
 Marshall and Blue, 290.
 Marryatt *v.* Townley, 250.
 Martin *v.* Strachan, 97. 193.
 Massey *v.* Sherman, 252.
 Masters and Rashley, 236.
 Maundrell *v.* Maundrell, 107. 234.
 Maynwaring *v.* Maynwaring, 293.
 Mead and Beauleark, 236.
 Mead and Goodright, 286, 287.
 Melligan and Nowlan, 252.
 Mellish and Short, 271.
 Michell and Pale, 218.
 Middleton and Cornbury, 218.
 v. Spicer, 271.
 Mildmay and Huntingdon, 112.
 Mildmay's Case, 119.
 Mildway *v.* Standish, 168.
 Miles and Kirkham, 236.
 Miller and Kinder, 259.
 and Abney, 268.
 Mills *v.* Banks, 252.
 Mitchell and Pale, 218.
 Mitford and Fenwick, 125.
 and Pybus, 131.
 Moggridge *v.* Thackwell, 278.
 Monk and Peacock, 275.
 Monnoux and Appowel, 114.
 Moody *v.* Moody, 186.
 and Cunningham, 236.

- Moody *v.* Walters, 295.
 Moorcroft *v.* Dowding, 251.
 Moore's Case, 205.
 Moore and Edwards, 258.
 Mores *v.* Huish, 275.
 Morgan and Jones, 217.
 and Powell, 242. 244.
 (*ex parte*), 286.
 Morley and Jones, 188.
 v. Morley, 294.
 Morrett *v.* Paske, 290.
 Morris and Ischam, 228.
 Moseley *v.* Moseley, 293.
 Moyse *v.* Gyles, 123.
 Munday and Duke of Leeds, 286.
 Mutton's Case, 128.

 Nabb *v.* Nabb, 251.
 Nabs and Jones, 252.
 Nandick *v.* Wilke, 247.
 Nash *v.* Smith, 267.
 Nevil *v.* Nevil, 116, 117
 v. Saunders, 206.
 Newcastle (Duke of) *v.* Lincoln,
 250.
 Newman *v.* Johnson, 253.
 Newton *v.* Preston, 259.
 Nicolls *v.* Sheffield, 120. 247.
 Nightingale *v.* Ferrers, 97. 177. 181.
 Noel *v.* Jevon, 279.
 Norfolk (Duke of) *v.* Browne, 267.
 Northumberland's (Duke of) Case,
 18.
 North *v.* Champérnoon, 274.
 Nowlan *v.* Miligan, 252.

 O'Hara . O'Neil, 258.
 O'Herlihy *v.* Hodges, 270.
 Oldham *v.* Hughes, 238.
 Oliver *v.* Gyles, 191.
 Onoby and Price, 283.
 O'Neil and O'Hara, 258.

 Osborne and Else, 125. 294.
 Osborne and Roll, 114.
 Osman *v.* Sheafe, 129.
 Otway *v.* Hudson, 274.
 Owen *v.* Williams, 268.
 Oxenden and Compton, 242. 244.

 Packer and Wyndham, 272.
 Page and Tuffnell, 218.
 v. Haward, 146.
 Pale *v.* Michell, 218.
 Palmer and Wills, 124.
 v. Young, 268.
 Papillon *v.* Voice, 248.
 Parker *v.* Brooke, 257.
 Partington and Andrews, 293.
 Partridge and Wheldale, 235.
 Paske and Morrett, 290.
 Pawlett and Attorney-general, 274.
 Peacock and Peinne, 166.
 v. Monk, 275.
 Pearce and Petfield, 108.
 Pearson *v.* Lane, 238.
 and Wright, 210.
 Pelham and Clowdsley, 252.
 Pembroke and Baden, 236.
 Penne *v.* Peacock, 166.
 Penson and Plunket, 219. 221.
 Perrat and Wilkins, 99.
 Perrot's Case, 140.
 Petfield *v.* Pearce, 108.
 Phillips *v.* Brydges, 275.
 Pickerell and Aggas, 227.
 Pickering *v.* Vowles, 268.
 Piers *v.* Hoc, 99.
 Pierson *v.* Garnett, 253.
 v. Shore, 268.
 Plimouth and Knight, 294.
 Plunket *v.* Penson, 219. 221.
 Pocock *v.* Reddington, 291.
 Pollard and Holloway, 111.

- Pollard *v.* Downes, 271.
 Pomfret (Earl of) *v.* Lord Windsor,
 227.
 Poole *v.* Poole, 217.
 Pope *and* Bevant, 279.
 Popham *and* Roe, 96. 100. 181.
 and Spry, 127.
 Porter's Case, 57.
 Porter *and* Donisthorpe *and* Wife,
 242.
 Portington's (Mary) Case, 119. 143.
 Portsmouth (Lord) *v.* Lord Effing-
 ham, 226.
 Powell *v.* Morgan, 242. 244.
 Preston *and* Newton, 259.
 Price *v.* Oneby, 283.
 Proby *and* Bastard, 248.
 Pryce *v.* Byron, 289.
 Purcell *and* Henry, 206.
 Pybus *v.* Mitford, 131.
 v. Smith, 206. 275.
 Pye *v.* George, 255. 294.

 Randall *v.* Leak, 204.
 Rashley *v.* Masters, 236.
 Ratcliffe *v.* Graves, 221.
 Raven *and* Swanton, 179.
 Raw *v.* Chichester, 268.
 Rawley *v.* Holland, 98. 135.
 Read *v.* Errington, 95. 125.
 v. Snell, 248.
 and Lloyd, 262.
 Reddington *and* Pocock, 291.
 Reed *v.* Tucker, 268.
 Reeve *and* Tregmiell, 127.
 Reeves *and* Hardy, 257.
 Reignold *and* Wood, 138.
 Ren (lessee of Hall) *v.* Bulkeley, 165.
 Rensbie *and* Jones, 217.
 Reynell *v.* Long, 112.
 Reynolds (ex parte), 288.

 Richardson *v.* Chapman, 252.
 Richmond (Duke of) *v.* Lord Ca-
 dogan, 250.
 Rider *v.* Bickerston, 294.
 Ridgard *and* Bonny, 227.
 Rigden *v.* Vallier, 118.
 Right ex dem. Phillipps *v.* Smith,
 92.
 Roberts *v.* Dixwell, 206. 248.
 Robinson *v.* Tong, 221.
 v. Cuming, 274.
 Rod *and* Hayter, 230.
 Roe *and* Gwam, 87. 158.
 v. Popham, 96. 100. 181.
 v. Tranmer, 128, 129, 130.
 dem. Crow *v.* Baldwere, 193.
 Rogers *and* Gibson, 209. 253.
 Rook *v.* Warth, 290.
 Rooke *v.* Staples, 37.
 Roll *v.* Osborne, 114.
 Romney *and* Foster, 116.
 Rowe *v.* Teed, 259.
 Rutland's (Countess of) Case, 182.
 188.
 Ryall *v.* Ryall, 251, 252. 258, 259.

 Sales *and* Goodright, 230.
 Salvin *v.* Thornton, 274.
 Samback *v.* Dalton, 211.
 Same's Case, 56.
 Samme's Case, 87. 127, 128.
 Samyne *and* Tudor, 218.
 Sand's Case, 224. 226.
 Sands *and* Attorney-general, 221.
 Sanders *v.* Bournford, 241.
 Sandford *and* Keech, 268.
 Sandys *and* Attorney-general, 229.
 Savage *and* Adams, 98. 134, 135.
 Savile *v.* Blacket, 166.
 Saville *and* Dixon, 225.
 Saunders *and* Nevill, 206.

- Saunders and Earlom*, 239. 290.
v. Dechew, 255.
Saye and Sele and Jones, 207.
Sayer and Allen, 291.
Scarfe and Casborne, 224.
Scroope v. Scroope, 262.
Scholey and Scott, 219.
Scott's Case, 114.
Scott v. Scholey, 219.
v. Fenhouillet, 230, 231, 232.
Scudamore and Crossing, 111.
Senhouse v. Earle, 257.
Sergison (ex parte), 286.
Sewell and Legate, 249. 274.
Seymour's Case, 136.
Shapland v. Smith, 206. 274.
Shard v. Shard, 236.
Sharp and Gerland, 88.
Shaw v. Weigh, 217.
Sheafe and Osman, 129.
Sheddon v. Goodrich, 267.
Sheffield and Nicolls, 120. 147.
Shipbrook (Lord) v. Lord Hinchin-
broke, 300.
Shenman and Massey, 252.
Shore and Pierson, 268.
Shorral and Willis, 163.
Short v. Wood, 296.
Shortridge v. Lamplugh, 95, 96.
Shrapnell v. Vernon, 223.
Silvester v. Wilson, 206.
Simpson and Doe dem. White, 207.
Skett v. Whitmore, 259.
Slater and Edwards, 166.
Sloucme v. Glubb, 177.
Smith and Right, ex dem. Phillips, 92.
v. Tyndall, 114.
and Shapland, 206. 274.
and Pybus, 206. 275.
v. Clay, 225.
and the King, 233.
and Green, 236.
Smith and Marlow, 255. 286.
and Bovey, 256.
and Nash, 267.
and Kirkham, 274.
and Wagstaff, 276.
v. Warren, 145.
v. Hibbart, 283.
Snagg's Case, 278.
Snap v. Turton, 165.
Snell and Read, 248.
Sneyd v. Sneyd, 112.
Snow and Walker, 97.
and Eare, 180.
Somerset's (Earl of) Case, 223.
Sonley v. Clockmakers Company,
278.
Souch and Witchcot, 293.
Southcoat v. Manory, 190, 192.
Sowray and Lingen, 236, 237.
Speed and Davies, 121, 132.
Spencer and Bagshaw, 206. 209.
248.
and Hampton, 252.
Spicer and Middleton, 271.
Spillet and Lloyd, 258. 267.
Sprange v. Bernard, 253.
Spry v. Popham, 127.
Squire v. Compton, 229.
Stafford (Marquis of) and King, 116.
Stamford and Best, 229.
v. Hobart, 250.
Standish and Mildmay, 168.
Stanley v. Stanley, 120. 249. 264.
Staples and Rooke, 37.
and Doe, 271.
Stapilten v. Stapilton, 182.
Starkey v. Brookes, 264.
Stephens and Green, 250.
v. Lord Bateman, 246.
Stileman v. Ashdowne, 262.
Stockman v. Hampton, 112.
Stokes and Goodtitle, 118.

- Stonehouse *v.* Evelyn, 263.
 Strachan *and* Martin, 193.
 Strathmore (Earl of) *and* Davis, 255.
 Stratton *v.* Best, 118. 128.
 Streatfield *v.* Streatfield, 147.
 Strut *v.* Mellish, 271.
 Sursess *v.* Crop, 275.
 Sussex (Earl of) *and* Leonard, 248.
 Swanton *v.* Raven, 179.
 Sweetapple *v.* Bindon, 236.
 Swinnock *v.* Crisp, 293.
 Symance *v.* Tatton, 295.
 Symmons *and* Mackreth, 255.
 Symons *and* Buckler, 111.
 Symson *v.* Turner, 206.

 Talbot *and* Duke of Chandos, 241.
 Tanfield *and* Warmstre, 218.
 Tarrant's Case, 119.
 Taster *v.* Marriott, 268.
 Tatton *and* Symance, 295.
 Taylor *v.* Alston, 260.
 v. Taylor, 261.
 Teed *and* Rowe, 259.
 Terry *v.* Terry, 290.
 Thackwell *and* Moggridge, 278.
 Thomas *and* Lake, 127.
 v. Keymish, 242. 244.
 and Heatley, 275.
 Thompson *and* Kebble, 300.
 Thornton *v.* Hawley, 236.
 and Salvin, 274.
 Throckmorton *and* Tilsley, 292.
 Throckmorton's Case, 141.
 Throgmorton's Case, 83.
 Thurstan *and* Tucker, 214. 223.
 Tiffin *v.* Tiffin, 230.
 Tilsley *v.* Throckmorton, 292.
 Tippin *v.* Cosin, 125.
 Tong *and* Robinson, 221.
 Townley *and* Marryatt, 250.

 Townsend's Case, 169. 170. 171.
 Townshend *v.* Townshend, 226.
 227.
 Tracy *and* Lethicuffier, 276.
 Trafford *v.* Ashton, 254.
 v. Boehm, 292.
 Tranmer *and* Roe, 128. 129. 130.
 Trecothick *and* Coles, 289.
 Tregame *v.* Fletcher, 189. 190.
 Tregmiell *v.* Reeve, 127.
 Trelawney *v.* Booth, 236.
 Trevithin *and* Croker, 119.
 Trevor *v.* Trevor, 109. 227.
 Trigg *and* Harland, 253.
 Tucker *v.* Thurstan, 214. 223.
 v. Reed, 268.
 Tuckfield *v.* Butler, 283.
 Tudor *v.* Samyng, 218.
 Tuffnell *v.* Page, 218.
 Tullet *v.* Tullet, 290.
 Turner *and* Symson, 206.
 Turton *and* Snape, 165.
 Twig *and* Abraham, 116.
 Twine *and* Inwood, 290.
 Twisden *v.* Lock, 250.
 Tyndal *and* Smith, 114.
 Tyrrel's Case, 211.

 Vallier *and* Rigden, 118.
 Vallis (ex parte Whitacre, in matter of), 285.
 Vaughan *and* Estofte, 112.
 Vavisor's Case, 190.
 Vernon's Case, 204.
 Vernon *v.* Vernon, 252. 290.
 and Shrapnel, 223.
 (ex parte), 282.
 Vigor *and* Attorney-general, 286.
 Villers *and* Wegg, 194. 196. 199.
 Voice *and* Papillon, 248.
 Vowles *and* Pickering, 268.

- Wade and Beckford, 225.
 Wagstaff v. Wagstaff, 218.
 v. Smith, 275.
 Waker v. Snow, 97.
 Walker and Campbell, 288.
 v. Denne, 235.
 Walters and Moody, 295.
 Walthall and Boydell, 93.
 Wansey and the Attorney-general,
 267.
 Wareham v. Brown, 253.
 Warmstrey v. Tanfield, 218.
 Warr v. Warr, 293.
 Warren and Smith, 145.
 Warth and Rook, 290.
 Warwick (Countess of) and Ed-
 wards, 236.
 v. Warwick, 257.
 Waterhouse and Buller, 158.
 Watts v. Ball, 224.
 Weale v. Lower, 131.
 Webb and Kirk, 252, 258, 259.
 Weigh and Shaw, 217, 218.
 Wells v. Fenton, 128.
 Wentworth's (Sir Butler) Case, 176.
 West v. Erissey, 250.
 Whateley . Kemp, 248.
 Wheate v. Hall, 164. 249.
 and Burgess, 226. 281.
 Wheldale v. Partridge, 235.
 Whetstone v. Bury, 276.
 Whitacre (ex parte, in matter Samuel
 Vallis), 285.
 Whitaker v. Whitaker, 236.
 Whitecote v. Lawrence, 288.
 Whitechurch v. Whitechurch, 229.
 White v. Carter, 248.
 Whitfield v. Fausset, 112.
 Whitmore and Skett, 259.
 Whitwick v. Jermin, 236.
 Whorwood and Attorney-general, 50.
 Wigg v. Villers, 194. 196. 199.
 Wilkes v. Leuson, 99.
 Wilks and Nandick, 247.
 Wilkins v. Perrat, 99.
 Williams v. Jekyll, 84.
 and Wray, 229.
 and Wynn, 233.
 v. Coade, 267.
 and Owen, 268.
 Willis and Shorral, 163.
 and Chester, 242. 244.
 and Fordyce, 251
 v. Willis, 259.
 Willoughby v. Willoughby, 233.
 Wills v. Palmer, 124.
 Wilmot v. Knowles, 190.
 Wilson and Silvester, 206.
 Winchester's (Marquis) Case, 223.
 Windmore and Godwin, 225.
 Windsor (Lord) and Earl of Pom-
 fret, 227.
 Wingfield v. Littleton, 94. 108.
 and Duncombe, 170.
 Winsmore and Godwin, 225.
 Witchcot v. Souch, 293.
 Witter v. Witter, 290.
 Wolsey and Armstrong, 95.
 Wood v. Reignold, 138.
 and Short, 296.
 Woodhouse v. Hoskins, 294.
 Woodliff v. Drury, 98. 140.
 Wray v. Williams, 229.
 Wright and Hewit, 237.
 v. Wright, 237. 267.
 v. Pearson, 210.
 Wroth and Leaper, 156.
 Wyndham v. Packer, 272.
 Wynn v. Williams, 233.
 Wynne v. Hawkins, 253.
 Wynston and Bould, 138

xxviii NAMES OF CASES IN THE FIRST VOLUME.

Yelverton v. Yelverton, 101.

Young and Jenkins, 88.

v. Dymock, 88.

Young and Palmer, 268.

v. Leigh, 295.

Zouche's Case, 24.

ESSAY

ON

USES AND TRUSTS.

CHAP. I.

Of Uses and Trusts before the Statute of 27 Hen. 8. c. 10.

1. PREVIOUSLY to the statute 27th Hen. 8. SECT. I.
Definition of
the use. c. 10. (usually called the statute of uses), the use was an equitable, or beneficial, interest, distinct from the legal property in the land. Upon principles, established in the courts of equity, the use itself was alienable by the *cestuique use*, and the statute of 1 Rich. 3. enabled him to convey the possession, without the concurrence of his trustee: and ultimately, the statute 27 Hen. 8. c. 10. converted the equitable, or beneficial, interest of the *cestuique use*, into a legal estate. I shall endeavour in this chapter to trace the origin, progress, and learning of the use in its fiduciary state.

SECT. I.

Definition of
the use.

The statute 1 Rich. 3. having described the fiduciary interest, which it was meant to affect, by the single word, *use*, it became necessary to ascertain, with precision, the meaning of the word. An equitable interest, not a use within the statute, may with propriety be called a trust.

It will be therefore proper to define the use; and with reference to the statute of 1 Rich. 3. it is important to ascertain the distinction between uses and trusts.

The use was said to be, “a trust or confidence, which is not issuing out of land, but as a thing collateral, annexed in privy to the estate, and to the person, touching the land; scil. that *cestuique use* shall take the profits, and that the terretenant shall make estates according to his directions^a.”

(2). The use consisted^b of three parts; that the feoffee would suffer the feoffor to take the profits: that the feoffee upon request of the feoffor, or notice of his will, would execute the estates to the feoffor, or his heirs or any other by his direction: that if the feoffee had been disseised, and so the feoffor disturb-

^a 1 Co. 121. a. Co. Litt. 272. b.

^b Bacon, *Uses*, 10.

ed, the feoffee would re-enter, or bring an action to recontinue the possession^c.

SECT. I.

Definition of the use.

II. Sir Francis Bacon^d says, "where the trust is not special, nor transitory, but general and permanent, there it is a use." A feoffment was made in fee, by which the possession, or seisin, was transferred to the feoffee; and a confidence, or trust, was placed in him to permit the feoffor, or any other person, and his heirs, to receive the rents and profits; and also to make such legal estates, as he or they should direct. This confidence was the use: for the feoffee had a permanent estate in fee on the lands, subject to the use, or distribution of the profits. The fiduciary or beneficial interest was commensurate to the legal estate. But a trust did not make this regular division of property into use and possession; it signified, that the grantor had executed a conveyance of the lands, by which he had not only transferred the possession, but also the use, or right to take the profits; reposing a personal trust in the grantee, that he would retain both, in order to answer some special purpose. Thus if he made a conveyance in trust, or to the intent, that the grantee should convey to a third person, the trust placed in the grantee was not to

SECT. II.

Distinction between uses and trusts.

(3.)

^c See Year Book 2 Edw. 4. 2. b.

^d See Bacon, Uses, 9.

SECT. II. pay over the profits, but to dispose of the profits and the possession.

Distinction between uses and trusts.

(4.) So if a man had enfeoffed another to the intent, or in trust, to be re-enfeoffed; or to the intent to be vouched^s; or to the intent to suffer a recovery^h; none of these intents, or trusts, were uses.

(5.) The trust above described is called by Sir Francis Bacon, "the special trust lawfulⁱ." But there is a special trust unlawful, which, he says, was created to the intent, "to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the præcipe, or the Statute of Mortmain, or the lords of their wardships, or the like; and those are termed frauds, covins, or collusions."

(6.)

In another place he adds^k (speaking of the special trust lawful), "And this we call confidence, and the Books do call them, intents; and therefore these three are to be distinguished, and not confounded; the covin, confidence, and use."

(7.) Upon the introduction of uses, the Court of Chancery assumed an exclusive jurisdic-

^s Bacon, *Uses*, 8.

ⁱ Bacon, *Uses*, 8.

^h 2 *Balk.* 676. See *Shep. Touch.* 526.

^k Page 9.

tion over them; and during the exercise of that jurisdiction previously to the statute of uses, its decisions were not free from the scruples of the common law: and from considerations arising from the laws and principles of tenure, and from the nature of the limited and inferior estates of tenants in tail, for life, and for years, it was determined, that neither tenant in tail, for life, nor for years, could stand seised to a use. The trust therefore declared upon the estate, or seisin, of a tenant, having a limited interest, was not, strictly speaking, a use^a.

SECT. II.

Distinction between uses and trusts.

It must follow, that if the Court of Chancery did not acknowledge the beneficial interest of the *cestuique trust*, he was without remedy; and consequently, that in those cases, where the trust was declared upon the seisin or estate of a person, not capable, according to the then contracted rules of equity, to stand seised to a use, the *subpæna* did not lie against the trustee to compel him to perform the trust.

It is probable, that the distinction, which has been taken between uses and trusts, may to some appear controvertible. But the opposers of it must contend, that the special trust before described, and the trust declared

^a Vide post 40. & seq.

SECT. II. upon the seisin of a tenant in tail, or for life, and upon the possession of a tenant for years, was within the statute 1 Richard 3. c. 1.; and consequently, that the *cestuique trust* might have conveyed the legal estate without the concurrence of the trustees, in whom it was vested: a construction, which, so far as it concerns the special trust, and the trust declared upon the possession of a tenant for years, would lead to practical consequences of considerable importance, but which I shall attempt to show in a subsequent part of this essay, is not tenable^a.

(9.) SECT. III. III. It is impossible to fix the precise period, when the use or trust was introduced into England: but conjecture has not been idle in attempting to supply the want of positive information. I do not mean to inquire, as to the origin of those personal trusts, which are better known in our law by the name of deposits, or bailments; for imagination can scarcely trace a period so remote, in which man, in society, was not sometimes induced to entrust another with the object of his care, or the fruits of his industry.

(10.)

A special trust seems to have been the root from which the permanent use arose; or, as Lord Bacon observes^b, "a trust was

^a Vide post 40. & seq.

^b Bacon, Uses, 9.

"the way to a use:" and in another place, "the special intent unlawful and covinous, was the original of uses, though after it induced to the lawful intent, general and special." The progress indeed from the trust created for a special or transitory purpose, to the general or permanent use, seems to be so natural, that the proof of it does not require the aid of authority^c.

SECT. III.

The introduction of trusts.

Mr. Selden^d has stated, that "Ethelred, Ealdorman of *Mercland*, had all that, which was the kingdom of *Mercland*, to his own use, as an ealdorman, and fief, given him in marriage with *Ethelfleda* by her father King Alfred. *Londoniam caput regni Merciorum* (saith *William of Malmesbury*) cui *dam primario Ethelredo, in fidelitatem suam cum filia Ethelfleda concessit.*" He adds,

(11.)

^c Yet the point seems to have been discussed in Lord Dacre's case, 27 Hen. 8. 7. b. (Year Book). The question was whether a use was devisable? It was contended, that the use being a novelty in the law, it could not be devised, because a devise, at that time, must have been supported by a custom. It was answered by York, that a use was merely a trust, which was at common law; for confidence was necessary between man and man; and that this trust was always

saleable or grantable at pleasure, by assurances not applicable to the transfer of the land itself. York's argument appears to be erroneous; for admitting that a trust in the general sense of the word, was co-eval with the law, yet it is evident, that the permanent division of property into the legal, and beneficial interest, distinct from each other, was an invention to evade or lessen the force of some pre-existing law,

^d Tit. Hon. 510.

Sect. III.
The introduction
of trusts.

“ that after Alfred’s death, his son Edward
“ was King of Westsex and Mercland, but
“ so, that he was King of Mercland in name
“ only; the whole possessions remaining to
“ Ealdorman Ethelred. *Duo regna Merc-*
“ *orum et West Saxonum conjunxerat; Mer-*
“ *ciorum nomine tenus, quippe commendatum*
“ *Duci Ethelredo, tenens.*”

According to Sir Martin Wright^b, the word *commendatum*, suggests a *trust*: and indeed considering this gift by Alfred according to the modern construction of a conveyance, it would appear to be an assurance, not operating upon the legal, but merely upon the beneficial interest; for Alfred gave the kingdom of Mercland to Ethelred, as the marriage-portion of his daughter, and yet the legal estate appears to have continued in Edward the son and heir of Alfred.

But it is evident, that Mr. Selden considered the case as amounting to a Saxon tenure, and not to a trust: and there is no ground for supposing, that Alfred voluntarily converted himself into a trustee, when he might have effected the same purpose by a simple gift, modified in any manner, suitable to his wishes, and without assuming an office, incompatible with his situation, as Sovereign,

^b Tenures, 47. Note C.

It has been argued with much propriety, that uses could not have existed before the statute *quia emptores terrarum*, 18 *Edw.* 1. which abolishes the immediate tenure between the feoffor and feoffee. "In ancient books no mention is made of a use; and if any use had been at the common law, it would have been specified in the ancient books of our law: and thus it seems to me, that before the statute of *quia emptores terrarum*, if one had made a feoffment in fee, the law would have created a tenure between the feoffor and the feoffee; which tenure is a *consideration*; and by such consideration the feoffee would have been seised to *his own use*: and so before that statute, there was no use by reason of the consideration before mentioned*."

SECT. III.

The introduction of trusts.
(12.)

It has been supposed, that trusts were known in the reign of Henry the third. This opinion^b is occasioned by the statute of Marlbridge^c, which relieves against false (13.)

* Per Pollard, 27 H. 8. 9. a. Year Book. But see Bro. N. C. 60. and March's N. C. 128. where it is said, *et opinio fuit*, that a use was at common law before the statute of *quia emptores terrarum*; but uses were not common before the same statute. And see note to pl. 2. 22. Vin. 179.

^b See Bro. N. C. P. 59, 60.

^c 52 Hen. 3. c. 6. "As touching them that use to enfeoff their eldest sons and heirs being within age, of their heritage, for to defraud the lords of the fee of their wardships, it is provided, accorded, and agreed, that

SECT. III.
The introduction
of trusts.

and covinous feoffments, made to defraud the chief lords of their wards. The statute, however, does not, I apprehend, warrant this conclusion. For as to the opinion, that the feoffor, in the case of a feoffment to his eldest son, or heir within age, took the profits for his own use, it is, as Sir Francis Bacon observes, a conceit; for although the profits were taken to the use of the son, it was still a feoffment within the statute^d: and as to the second case mentioned by the statute, that certainly alludes to feoffments upon condition, and not upon trust^e. There is ground to conclude, that neither uses nor trusts were known at that time, from the circumstances attending the succeeding king's reign (Edward the first): for the clergy, who were then endeavouring, *arte vel ingenio*, to bring lands into mortmain without license, were not, it seems, acquainted with the uti-

" by occasion of any such
" feoffment no chief lord
" shall lose his ward. (2.)
" Moreover, touching them
" that fain false feoffments
" of their lands, which they
" will lease for term of years
" to defraud the chief lords
" of their wards, wherein
" it is contained that they
" are satisfied of the whole
" service due unto them
" until a certain term, so
" that such feoffees are
" bound at the said term to

" pay a certain sum to the
" value of the same lands,
" or far above; so that after
" such term, the land shall
" return unto them, or to
" their heirs, because no
" man will be content to
" hold it upon the price; it
" is provided and agreed
" that by such fraud no
" chief lord shall lose his
" ward."

^d Bac. Uses, 25.

^e See 2 Inst. 111. Poph.
77.

ity of trusts. The statute *de religiosis*¹, which was principally made to prevent alienations in mortmain, takes no notice of them: and if uses or trusts had been then known, it is most probable, that the clergy, who were more conversant in the civil law than the laity, would have taken advantage of them.

SECT. III.

The introduction of trusts

(14.)

It has been argued, that trusts were early received, on account of the writ called *causa matrimonii prælocuti*². Thus, if a woman had given lands in fee, or for life to a man, to the intent that he should marry her, the common law gave her this writ of *causa matrimonii prælocuti*, to recover her lands, in case the marriage did not take effect³. So, if the woman had given the lands to a stranger, to the intent, that he should convey them to her and her intended husband, the same writ was allowed her⁴. This writ, it must be observed, was granted to the woman by the common law, which is alone a conclusive reason, that the confidence reposed in the husband, or stranger, was not a use nor trust; for it is a rule, that whenever a remedy is given against uses or trusts, that remedy is afforded by an *express statute*,

(15.)

¹ 7 Edw. 1. See Bac. 25. Poph. 77.

² Vide Year Book 27 Hen. 8. 10.

³ F. N. B. 471.

⁴ Ibid. 472.

SECT. III.
The introduc-
tion of trusts.

and not by the *common law*¹. It has been further said², that trusts were introduced in the reign of Edward the second; but I have found no instance of a trust, which can support that opinion³.

(16.) Trusts, however, were certainly frequent during the reign of Edward the third. *Brooke*, in a note upon a case, reported in the year book of that monarch's reign⁴ (where feoffees were sued by petition), thinks it worthy of observation, that trusts were known in those days⁵. And although Sir Francis Bacon says⁶, that this case, and the book of 8 *Ass.* (where a fine was levied *in autre droit*) are but implications of no moment; yet the statute 50 Edw. 3. c. 6. clearly proves, that *special trusts* were then in practice. The statute runs thus: "Because that divers people inherit of divers tenements, borrowing divers goods in money, or in merchandise, of divers people of this realm, do give their tenements and chattels to their friends by *collusion* thereof to have the profits at their will, and after do to flee to the franchise of West-

¹ Poph. 77. Bac. Uses, 23.

² Brent's case. 2 Leon. ca. 25. per Harpur.

³ I observe, however, that Mr. Daines Barrington, in his Observations upon the Statutes (403. note i.),

says, there is an Irish statute against secret feoffments, so early as the third of Edward the 2d, styled the Statutes of Kilkenny.

⁴ 44 Ed. 3. 25.

⁵ Bro. Feof. al. Uses, 9.

⁶ Bac. Uses, 23, 24.

“minster, of St. Martin le Grand, of London, *Secr. III.*
 “or other such privileged places, and there *The introduction of trusts.*
 “do live a great time with an high counte-
 “nance of another man’s goods, and profits of
 “the said tenements and chattels, till the
 “said creditors shall be bound to take a small
 “parcel of their debt, and release the rem-
 “nant. It is ordained and assented, that if
 “it be found that such gifts be so made by
 “collusion, that the said creditors shall have
 “execution of the said tenements and chat-
 “tels, as if no such gifts had been made.”

*By a subsequent statute,
 1 Rich. 2. c. 9. “Because
 “it is complained to the
 “King that many people of
 “the said realm, as well
 “great as small, bearing
 “right and true title, as
 “well to lands, tenements,
 “and rents, as in other
 “personal actions, be
 “wrongfully delayed of
 “their right and actions,
 “by means that the occu-
 “piers or defendants to be
 “maintained and sustained
 “in their wrong, do com-
 “monly make gifts and
 “feoffments of their lands
 “and tenements which be in
 “debate, and of their other
 “goods and chattels to
 “lords and other great men
 “of the realm, against
 “whom the said pursuants
 “for great menace, that is
 “made to them, cannot,
 “nor dare not, make their
 “pursuits: and also on the
 “other part complaint is

“made to the King, that
 “oftentimes many people
 “do disseise other of their
 “tenements, and anon, af-
 “ter the disseisin done,
 “they make divers aliena-
 “tions and feoffments,
 “sometimes to lords and
 “great men of the realm
 “to have maintenance, and
 “sometime to many persons
 “of whose names the dis-
 “seisees can have no know-
 “ledge, to the intent to de-
 “fer and delay by such
 “frauds the said disseisees
 “and the other demandants
 “and their heirs, of their
 “recovery, to the great
 “hindrance and oppression
 “of the people; it is or-
 “dained and established,
 “that from henceforth no
 “gift or feoffment of lands,
 “tenements, or goods, be
 “made by such fraud or
 “maintenance; and if any
 “be in suchwise made, they
 “shall be holden for none

SECT. IV.

Introduction of
uses.

(17.)

IV. The earliest mention, which I find, of the word *use*, is in the statute of provisors, 7 Rich. 2. c. 12.^x; and Bacon considers the first practice of uses to be about that reign.^y It is likely, however, that uses of the permanent kind before described were known in the preceding king's reign; for as in their commencement uses were of a secret nature (the use being originally created on the estate of the feoffee merely by a *parol* declaration), it is probable, that they were not noticed by the legislature, until they had gained some degree of notoriety. In a case before cited^z, Manwood says, "I have seen divers ancient
(18.) "deeds of uses, and in ancient times you

"and no value; and the
"said disseisees shall from
"henceforth have their re-
"covery against the first
"disseisors, as well of the
"lands and tenements,
"as of their double da-
"mages, without having
"regard to such aliena-
"tions, so that the dis-
"seisees commence their
"suits within the year next
"after the disseisin done.
"And it is ordained and es-
"tablished, that the same
"statute shall hold place in
"every other action in plea
"of land where such feoff-
"ments be made by fraud
"or collusion, to have
"their recovery against the
"first such feoffor. And
"it is to wit, that this sta-

"tute ought to be under-
"stood where such feoffors
"thereof take the profits."

^x "And moreover it is
"assented, that if any alien
"have purchased, or from
"henceforth shall pur-
"chase, any benefice of
"holy church, dignity, or
"other thing, and in his
"proper person take pos-
"session of the same, or
"occupy it himself within
"the realm, whether it be
"to his own proper use, or
"to the use of another, with-
"out especial license of
"the King, he shall be com-
"prised within the same
"statute."

^y Bac. 24.^z Breat's case, 2 Leon.

15.

"shall not find that any would purchase
 "lands to himself alone, but had two or three
 "joint feoffees with him, and he who was
 "first named in the charter of feoffment, was
 "*certainque use*, although that no use was de-
 "clared to him upon the livery; and so it was
 "known by the *occupation* of the lands. And
 "the reason why no mention is made in our
 "ancient books of uses, is, because men
 "were then of better consciences than now
 "they are; so, as the feoffees did not give oc-
 "casion to their feoffors to bring *subpœnas* to
 "compel them to perform the trusts reposed
 "in them."

SECT. IV.

Introduction of
uses.

In consequence of the secret manner in
 which uses were at first declared, and of the
 difficulty of obtaining evidence of the object
 of the parties, and the extent of the bene-
 ficial interest, by the ordinary proceedings of
 a court of law, it has been said, that John
 Waltham, who was Bishop of Salisbury, and
 Chancellor to King Richard the second, by
 a strained interpretation of the statute of
 West. 2. devised the writ of *subpœna*, re-
 turnable in the Court of Chancery only^b.

V. The use afforded the clergy an oppor-
 tunity of avoiding the statutes of mortmain;

SECT. V.

History of uses
to the reign of
Rich. 3.

^b 3 Black. Com. 52. See and Gilb. Forum Romanum,
 Mr. Cruise's valuable Di- 17.
 gest, 1 vol. 396. & seq.

(19.)

Sect. V.
History of uses
to the reign of
Rich. 3.

for although they could not buy lands in their own names, yet they might evade the statutes by obtaining grants, not directly to, but to the use of, their religious houses. But the legislature interfered, and by a statute made 15 Rich. 2. c. 5.^a, it was enacted, that the lands so purchased to uses should be amortized by license from the crown, or sold to private persons; and that uses should be sub-

“ And moreover it is
“ agreed and assented, that
“ all they that be possessed
“ by feoffment, or by other
“ manner, *to the use of re-*
“ *ligious people*, or other
“ spiritual persons, of lands
“ and tenements, fees, ad-
“ vowsons, or any other
“ possessions whatsoever,
“ to amortize them, and
“ whereof the said religious
“ and spiritual persons take
“ the profits, that betwixt
“ this and the Feast of St.
“ Michael next coming,
“ they shall cause them to
“ be amortized by the li-
“ cense of the King and of
“ the Lords, or else that
“ they shall sell and alien
“ them to some other use
“ between this and the said
“ Feast, upon pain to be
“ forfeited to the King, and
“ to the Lords, according
“ to the form of the statute
“ of religious, as lands pur-
“ chased by religious peo-
“ ple: and that from hence-
“ forth no such purchase be
“ made, so that such re-
“ ligious or other spiritual
“ persons take thereof the

“ profits as afore is said,
“ upon pain aforesaid, and
“ that the same statute ex-
“ tend and be observed of
“ all lands, tenements, fees,
“ advowsons, and other
“ possessions, purchased,
“ or to be purchased, to
“ the use of guilds or fra-
“ ternities. And moreover
“ it is assented, because
“ mayors, bailiffs, and com-
“ mons of cities, bo-
“ roughs, and other towns,
“ which have a perpetual
“ commonalty, and others
“ which have offices perpe-
“ tual, be as perpetual as
“ people of religion, that
“ from henceforth they
“ shall not purchase to
“ them and to their com-
“ mons, or office, upon
“ pain contained in the said
“ statute de religiosis. And
“ whereas others be pos-
“ sessed, or hereafter shall
“ purchase to their use,
“ and they thereof take the
“ profits, it shall be done
“ in like manner as is afore-
“ said of people of reli-
“ gion.”

ject for the future to the statutes of mortmain, and be forfeitable like the lands.

SECT. V.

History of uses
to the reign of
Rich. 3.

The disputes between the Houses of York and Lancaster originated in the reign of Richard the second. It was natural, that men, becoming parties to these unfortunate quarrels, should seek the means of retaining their estates in their own families by preserving them from forfeiture. This was effected by the aid of uses. The most plain and simple plan was that of conveying lands, in the lifetime of the grantor, to such uses as were directed in the deed, or by parol declaration. By another, a power was given over the use which was not suffered by the common law over the land; that of devising. As the legal estate was vested in the feoffees by either of these dispositions, the lands were exempted from forfeiture. The causes then, which induced men to continue uses at this period, were extremely different from those of their production. Their origin was occasioned by fraud; their continuance proceeded from laudable motives.

(20.)

(21.)

During the civil commotions, which attended the troublesome reigns of Richard 2. and Henry 4. most of the lands in the kingdom were conveyed to uses. A practice so general could not escape the notice of the legislature; and therefore in some general acts,

SECT. V. as in 21 R. 2. c. 3. and in some particular
 History of uses
 to the reign of
 Rich. 3.
 (22.) ones, as in the case of the Duke of Northumberland^b, forfeitures for treason were extended not only to the lands, of which the person attainted was himself seised, but to those whereof he was seised as *cestuique use*.

(23.) During the reigns of Henry the fourth, Henry the fifth, and Henry the sixth, I find only three statutes relating to *trusts*. The statutes of 4 Hen. 4. c. 7. and 11 Hen. 6. c. 3. were enacted to confirm and enlarge the 1 Rich. 2. c. 9. before stated. But by the 5th chap. of the 11 Hen. 6. it appears, that tenants for lives or years, who were subject to actions of waste by the reversioner, upon their commission of it, had taken advantage of the doctrine of trusts, in order to escape punishment, by conveying their estates to friends in trust for themselves, and afterwards committing waste upon the lands at their pleasure: they still continuing to occupy the premises, and to take the profits to their own use: for the reversioner being ignorant of the *legal* owner of the lands, did not know against whom to bring his action: "It is therefore ordained and established, that they in the reversion, in such case, may have and maintain a writ of waste against the said tenants for term of life, of another's

^b See the Year Book 11 Hen. 4. 52. pl. 30.

"life, or for years, and so recover against them the place wasted, and their treble damages for the waste by them done, as they ought to have done for the waste committed by them before the said grant and lease of the estate."

Sacr. V.

History of uses
to the reign of
Rich. 3.

In the 5th Hen. 5.^c it appears, that a case arose, upon the nature and extent of the estate of cestuique use. A man being seised of a manor, to which an advowson was appendant, conveys the manor to feoffees to his own use, and afterwards is outlawed in an action of debt. During the outlawry, the church becomes vacant, and the cestuique use presents to the church; the King brings his *quare impedit*, and the case was determined in his favour; for cestuique use, as tenant at will to his feoffees, had a possession, which was forfeited to the crown by the outlawry.

But the great point seems to have been settled in the 4th Ed. 4.^d, that cestuique use could obtain no relief in the courts of common law against his feoffees, but must rely upon the equitable jurisdiction of the Court of Chancery. But even in this King's reign the principles of equity were so little understood, that it was determined, that the sub-

(25.)

^c Year Book 5 Hen. 5.
3. 6. Bro. Feoff. al. Uses,
pl. 45.

^d 4 Ed. 4. 8. b. pl. 9.

SECT. V. *pena* did not extend to the *heir* of the feoffee, who was in by law; but relief in such case could only be had by his bill in Parliament*.

History of uses
to the reign of
Rich. 3.

From the 11th Hen. 6. to the reign of Rich. 3. (which includes a space of fifty years), the Statute Book is totally silent upon the subject of uses. From this circumstance Sir Francis Bacon concludes, and there is ground to believe, that uses were most favoured about that time. The statute of 1 Rich. 3. c. 1. materially increased the power of cestuique use.

Stat. of 1 Rich.
3. c. 1.

(27) This statute recites, "That forasmuch as
"by privy and unknown feoffments, great
"unsurety, trouble, costs, and grievous vex-
"ations daily grow betwixt the King's sub-
"jects, insomuch that no man that buyeth
"any lands, tenements, rents, services, or
(28.) "other hereditaments, nor women that have
"jointures or dowers in any lands, tene-
"ments, or other hereditaments, nor men's
"last wills to be performed, nor leases for
"term of life or years, nor annuities granted
"to any person or persons, for their services

* Year Book 8 Ed. 4. 6. 22 Ed. 4. 6. Carey, 13. But this was soon remedied. See Keilw. 42. b. They who wish to examine the early decisions upon uses and trusts, may be assisted by the following re-
ferences to the Year Books: 9 Hen. 4. 8. 12 Hen. 4. 21. 1 Hen. 5. 4. 33 Hen. 6. 15. 5 Ed. 4. 7. 8. 7 Ed. 4. 14. 18 Ed. 4. 11. 7 Ed. 4. 29. 17. and generally to Bro. tit. Feoff. al. Uses.

"for term of their lives, or otherwise, be in SECT. V.
 "perfect surety, nor without great trouble Stat. of Rich.
3. c. 1.
 "and doubt of the same, because of such
 "privie and unknown feoffments: for the
 "remedy whereof it is ordained, established,
 "and enacted, by the advice of the Lords
 "spiritual and temporal, and the Commons
 "in this present parliament assembled, and
 "by authority of the same, that every es-
 "tate, feoffment, gift, release, grant, leases,
 "and confirmations of lands, tenements,
 "rents, services, or hereditaments, made or
 "had, or hereafter to be made or had, by any
 "person or persons being of full age, of
 "whole mind, at large, and not in duress, to
 "any person or persons, and all recoveries
 "and executions had or made, shall be good
 "and effectual to him to whom it is so made,
 "had, or given, and to all others to his use,
 "against the seller, feoffor, donor, or granter
 "thereof, and against the sellers, feoffors, (29.)
 "donors, or granters, his or their heirs, claim-
 "ing the same only as heir or heirs to the
 "same sellers, feoffors, donors, or granters;
 "and every of them, and against all others
 "having or claiming any title or interest in
 "the same, only to the use of the same
 "seller, feoffor, donor, or granter, sellers,
 "feoffors, donors, or granters, or his or their
 "said heirs, at the time of the bargain, sale,
 "covenant, gift, or grant made: saving to
 "every person or persons such right, title,

Sect. V. "action, or interest, by reason of gift in tail
 Stat. of : Rich. "thereof made, as they ought to have had
 3. c. 1. "if this act had not been made."

Sect. VI. VI. This statute was evidently intended
 The operation and effect of the
 stat. : Rich. 3. for the benefit of purchasers, by giving the
 cestuique use an alienable power over the pos-
 session, as well as the use. But the inten-
 tion of the legislature was frustrated; for the
 statute did not deprive the feoffees of the
 power of alienation; and consequently if
 they aliened the land for a valuable consider-
 ation, and without notice, previously to any
 disposition made by cestuique use pursuant to
 the statute, such alienation disabled cestuique
 (30.) use from exercising the power which the
 statute meant to afford him. Besides this in-
 convenience, there was a still greater pro-
 duced by the statute; for it often occasioned
 a kind of double-handed proceeding, or fraud,
 both in the feoffees and cestuique use. The
 feoffees had a power over the possession by
 the common law, and the cestuique use by
 the statute. They often colluded, and by
 making secret and different feoffments, they
 purposely defeated each other's alienation,
 with a view to deceive purchasers.

Of the aliena-
 tion of the ces-
 tuique use.

(1.) It has been a question of some import-
 ance, and perhaps never decided, whether
 in some cases any or what part of the estate
 of the feoffees continued in them after the

feoffment of, or alienation by, the cestuique
use.

SECT. VI.

The operation
and effect of the
stat. 1 Rich. 3.

If cestuique use in fee-simple had made a feoffment in fee-simple, according to the statute 1 Rich. 3. c. 1. it seems, that the whole interest of the feoffees was thereby conveyed. So if there had been cestuique use in fee-simple, and he had made a feoffment in fee-simple, upon condition of re-entry, and the condition was afterwards broken, and the cestuique use had entered; the estate of the feoffees was not restored by such entry^a.

In fee.

(31.)

But notwithstanding the alienation of cestuique use in fee had this effect by the statute of 1 Rich. 3. there was a distinction, when cestuique use had only a limited estate in the lands, as an estate for life or in tail, with a remainder over.

Of cestuique use
in tail, &c.

(32.)

In a case^b in the seventh year of Edward the sixth's reign, one Davis, being seised in fee, enfeoffed J. L. and others in fee, in the 19th year of Henry the eighth, to the use of his wife for life, remainder to his brother in tail, remainder to B. H. in tail, remainder to the right heirs of the feoffor. Afterwards,

(33.)

^a 21 Hen. 7. 25. Bro. ^b Davis's case, Dyer, 88.
sit. Feof. al. Uses, pl. 12. b. 89. a.
Co. Litt. 103. a.

Sect. VI. in the 24th Henry 8. Davis and his wife levied a fine with proclamations to Sir H. W. and others in fee, to the use of Sir H. W. and his heirs in fee. The brother, the first in remainder, joined in this fine. Sir T. W. son and heir of Sir H. W. bargained and sold the lands to the King in fee. After this the brother died without issue, and then the wife died. J. L. the surviving feoffee, brought his petition, and this matter was found by the verdict. In arrest¹ of judgment it was alleged on the part of the King, that the petition did not lie for the feoffee, because the fee-simple of the use was lawfully conveyed to Sir H. W.; and therefore J. L. the feoffee, could not enter to revive the use; because he could not be seised of the fee-simple in the same manner as he was before the alienation. This case does not appear to have been determined; and therefore Dyer adds, "*et ideo quære inde.*"

(34.) However, in a case sent from the Chancery for the opinion of the Judges^a, they were in favour of this opinion. It was thus: there was cestuique use in tail, remainder over in tail, remainder to the first cestuique use (in tail) in fee. Cestuique use in tail before the 27th Hen. 8. made a feoffment in fee to the use of himself for life, remainder to his first

^a Baskerville's case. Dyer, 58. a. Zouche's case, 329. b. 330. a. Vide case.

son (being heir in tail) and his wife for their lives, remainder to the use of the heirs of their bodies, remainder to the use of the right heirs of the feoffor. The statute 27 Hen. 8. c. 10. is passed, and the feoffor dies. The son and his wife enter: and then the first feoffees enter, to revive the former uses in tail. Dyer and Manwood were both of opinion, that the entry of the feoffees was unlawful; for that the fee-simple in the use was lawfully transferred, and the right of the feoffees bound by the statute of 1 Rich. 3. Therefore, by their entry, the feoffees could not have their former estate; that is to say, the fee-simple. This opinion was sent into Chancery by those Judges, and Catlyn and Saunders were of the same opinion.

Sect. VI.

The operation
and effect of the
stat. 1 Rich. 3.

On the other hand, it was expressly stated, in the beginning of the reign of Henry the seventh^c, that if cestuique use *in tail* made a *feoffment* in fee, the feoffees might enter after the death of cestuique use in tail, for the purpose of révesting the former uses; and that a feoffment by cestuique use *for life* operated only upon his estate for life; and consequently did not create a forfeiture. This opinion, it seems, was adopted in the reign of Henry the eighth: for Brooke^d says,

(35.)

^c Bro. tit. Feof. al. Uses, pl. 22. 4 Hen. 7. 18. Vide also Dyer, 57. b. p. 1. as to a lease by cestuique use for life.

^d Bro. tit. Fines, pl. 107.

SECT. VI. that there was then no occasion for entry or claim, within the five years, to avoid a fine levied by cestuique use *for life* with proclamations; such fine not working a forfeiture. The rule, that neither a feoffment nor fine by cestuique use for life amounted to a forfeiture of his estate, must have been established upon one of these grounds;—that by the feoffment or fine the use and legal estate passed to the grantee *during the feoffor's life*, while the remainder continued in the first feoffees; or that, by the fine or feoffment, a base fee passed to the grantee, determinable upon the death of cestuique use by the entry of the feoffees.

The operation
and effect of the
stat. 1 Rich. 3.

- (86.) Delamere's case¹ was, in substance, thus; R. D. in the 13th Hen. 8. enfeoffed T. S. and others in fee to the use of himself and his wife, and the heirs of their two bodies; and in default of such issue, remainder to R. D. in tail; remainders over. R. D. in the 26th Hen. 8. enfeoffed W. D. in fee; afterwards R. D. died, and the heir of the surviving feoffee entered to revive the ancient uses; and upon solemn argument it was held, that the entry of the feoffees was lawful. It was said in this case, that by the feoffment of R. D. the fee-simple in the lands passed; but that after the death of the

¹ Flowl. 348 to 353. 1 Co. 128.

feoffor the feoffees might re-enter to revive the ancient uses; but that, although this right of entry remained in the feoffees, yet until their regress the fee-simple was out of them. This case was considered as establishing a principle different from the determination in the case cited from Dyer; and it was observed, that this was determined upon solemn argument, but that from Dyer was only the opinion of the Judges, without any argument⁶:

Sacr. VI.

The operation
and effect of the
stat. 1 Rich. 3.

The case from Dyer appears irreconcilable to the first case cited from Brookes's Abridgment; but perhaps it is not altogether inconsistent with Delamere's case. The statute of Richard renders the feoffment of cestuique use valid against all claiming any title or interest in the lands only to the use of the feoffor or his heirs. Now when the feoffor in the latter case died, the feoffees did not claim to the use of the heirs, but of the wife, of the feoffor; in which case they were neither restrained by the statute, nor the common law. But in the case from Dyer, the first feoffees certainly did claim to the use of the heir in tail of cestuique use. The only doubt appears to have been, whether the words of the statute, "claiming the same only as heirs of the feoffor, &c." should

(57.)

SECT. VI. extend to the heirs *special*, as well as a *general*^b.

The operation
and effect of the
stat. 1 Rich. 3.

(38.) If the case from Dyer be correctⁱ, a feoffment by cestuique use *in tail*, after the statute of Richard the third, had the same operation in barring the claims of the issue, as a fine would have had^b. I say, as a *fine* would have had; for notwithstanding the effect of it was at first doubted, it appears to have been settled^c, that a fine would have bound the issue in tail of cestuique use, and also the entry of the feoffees, while they claimed to *the use of the issue*. But according to the doctrine in Delamere's case, neither the feoffment nor the fine would have barred any remainder expectant on the determination of the estate tail; for whenever the entail ceased, the feoffees would have had a right to enter to revive the ancient uses; in that case they would not have claimed to the use of the feoffor, or his heirs, but to the use of a stranger. I must observe, that Gilbert^d, in his Treatise on the Law of Uses and Trusts, seems to have been in an error, when he asserts, that a recovery suffered by a cestuique use in trust, did not, after the statute 1 Rich. 3. bind the issue in tail: for notwith-

ⁱ See B. N. C. 147.

^b Dyer, 329.

^c Sed contra Year Book
19 Hen. 8. 13. & Hen. 7.
18.

^c B. N. C. 146. March.

N. C. 140. Year Book

27 Hen. 8. 20.

^d Gilb. Uses, 32.

standing the doubt entertained in 30 Hen. 8.^e, Sect. VI.
 it appears from the words of, and the sub-
 sequent construction upon, the statute, that The operation and effect of the stat. 1 Rich. 3. (39.)
 the recovery bound the issue claiming as
 heirs *only* of the grantor or recoverer^f.

(2.) When the statute 1 Rich. 3. passed, a use, Of trusts and interest not within the statute 1 Rich. 3.
 as Sir Francis Bacon observes^e, appeared "in
 "his likeness; for, there is not a word spoken
 "of *taking the profits* to describe a use by,
 "but of *claiming to a use*." The statute does
 not even mention the words *trust* and *confi-*
dence, which are so particularly expressed in
 the statute 27 Hen. 8. c. 10. It is evident,
 that the statute extended merely to uses de-
 clared upon a seisin or legal estate in fee^h:
and that a trust or confidence declared upon
the seisin or estate of a tenant in tail, or for
life, or the possession of a lessee for years,
was not a fiduciary interest, within the mean-
ing of the use described by the statute.
 This construction was adopted, when courts
 of equity, tinctured with the prejudices of
 the common law, had conceived, that the
 estates of tenant in tail, for life, and years,

(40.)

^e Vide Bro. N. C. 147.
 "It was holden *per*
 "plures in the Chancery,
 "if a recovery be had, in
 "which cestuique use in
 "tail is vouched, and the
 "demandant recovers, then
 "this shall bind the issue."
 Bro. Feoff. al. Uses, pl. 56.

March's N. C. 137. See
 also the Year Book 19 H.
 8. 13. Bassett and Morgan
 v. Manxell, Plowd. 4.
^f Bac. Uses, 27.
^h See 1 Co. 128. a. b,
 Year Book 19 Hen. 8. 13,
 4 Hen. 7. 18. Bassett v.
 Manxell, Plowd. 3.

Sec. VI. were, from their nature, incapable of being

The operation and effect of the

stat. 1 Rich. 3.

Estate tail.

For as to the estate or seisin of a tenant in tail, it was held, that no use could be limited upon it: 1st, because the tenure of itself created a valuable consideration; 2d, because the statute *de donis* had appropriated and fixed the estate tail to the donee and the heirs of his body, so that neither he, nor they, could execute the use¹. I must here observe, that the exception in 1 Rich. 3. extended only to tenant in tail of the legal estate, and not to cestuique use tenant in tail².

Estate for life.
(41.)

With respect to the estate or seisin of tenant-for life, the consideration of tenure between the lessor and lessee appears to have been incompatible with the use. It is expressly stated in 2 Roll. Abr. 781. pl. 6. that if a lease be made for life, that shall be to the use of the lessee; and in Dyer (8 b.), it is said that, "if the feoffees make a lease for life, or an estate tail; in these cases, if they be argued closely, the law will prove that the lessee or donee cannot be

¹ "It was adjudged by the advice of all the justices, that tenant in tail could not stand seised to a use," Year Book 27 H. 8. 10. a. 2 Co. 78. a. Bro. Feof. al. Uses, pl. 40. Co. Litt. 19. b. Plowd. 555. 2 Roll. Ab. 780. Jenk. Cent. 195. Gilb. on Uses, 11. 205. and the note to 22 Vin. 181. pl. 2.

² B. N. C. 146.

“seised to an use.” This I apprehend to have been the law, notwithstanding any inference to the contrary, which may be raised from an expression in Brooke, Feoff. al. Uses, pl. 40. that where rent is reserved, there, though a use is expressed to the donor, it is a consideration that the donee shall have it to his own use. The point, indeed, now, is rendered of no importance, as the stat. 27 H. 8. certainly extends to a trust declared upon the seisin of a tenant for life. But in fact, there could have been no difference between a lease for life, and a lease for years; and I shall proceed to show, that a trust declared upon the possession of a tenant for years, was not within the statute of 1 Rich. 3. : and indeed it is of real consequence, that this point should be understood.

SECT. VI.

The operation and effect of the stat. 1 Rich. 3.

(41.)

To apply this learning to modern practice, ^{Estates for years.} and to put a probable case: suppose A. possessed of the legal and absolute interest of 1000 years, and that he assigns over his term to B. in trust for himself, and then makes a feoffment in fee. This plan is frequently adopted for the purpose of acquiring a freehold by disseisin, and at the same time of providing against a forfeiture of the term by the entry of the remainder-man. But the intention of the parties would be frustrated, supposing the trust declared upon the term of 1000 years to be a use within the statute of

Sect. VI.
The operation
and effect of the
stat. 1 Rich. 3.

(42.)

1 Rich. 3. In such case the *legal* estate of B. (according to Delamere's case, and the words of the statute) must pass by the feoffment of A. Now that feoffment must either create a freehold by disseisin, or it must operate merely to the extent of the term; the latter construction would not answer the purpose; and by the former, A. would be exposed to the forfeiture, which he intended to prevent. So it is usual for a tenant for life, who is about to make or concur in a conveyance, which may expose him to the forfeiture of his life estate, to make a previous demise of the lands to a trustee for 99 years (if he shall so long live) in trust for himself. It is therefore, as I observed before, of real consequence, that it should be ascertained, whether the trust of a term of years *can in any case* be considered within the statute of Rich. 3.

(48.)

I conceive, that upon an attentive perusal of the authorities upon the subject, we may collect these points: first, That the statute of Richard was intended only to extend to *uses* properly so called; or, in other words, it has never been construed to comprise such fiduciary interests, as at the time of the act were not cognizable by the Court of Chancery; and secondly, That a termor or lessee for years could not at that time stand seised either to an *implied* or *express* use; or, to ex-

plain myself more clearly, that the subpœna was not issuable against him for the purpose of compelling him to perform the trust declared upon his lease; because it was supposed, that the contract between the lessor and lessee, and the consideration upon which the latter took the lease, were incompatible with, and repugnant to, the nature of a use, declared to any other person.

SECT. VI.

The operation and effect of the stat. 1 Rich. 3.

I mention this rule as the construction of the court of chancery, before the statute of uses, when it is well known, that that court still favoured the conclusions of the common law. The use or trust declared upon the estate of a lessee for years was in fact the *jus precarium*; the cestuique trust having nothing to depend upon, but the honour and conscience of his trustee. It was not till after the statute of uses, that the court of chancery, acting upon more liberal principles, and being under the necessity of once more watching over the consciences of men, found an opportunity of supporting that as a *trust*, which the courts of common law rejected as an *use*, and of adopting a system in respect to the former, which is attended with all the benefits, and without any of the inconveniences, of the latter. On the other hand, the courts of equity have never considered any fiduciary interest as a *use*, which was not considered as such before the statute 27 Hen. 8. Such a

(44.)

Sect. VI. construction would not have answered the purposes of equity. Thus, for instance, no use, as I have mentioned, could be declared upon a lease for years, and it was not within the nature of 27 Hen. 8.; yet the court of chancery conceived, that the confidence reposed in the lessee was as much to be observed in equity, as any other kind of use or trust. How was this confidence to be supported? Certainly not as a use, but as a trust, which the court of chancery could fashion according to the more modern notions of equity. If it had been supported as a use, it must have been adopted with all its defects. But it is certain, that the trust, declared upon a term of years, differs in most essential points, from what a use formerly was.

The operation
and effect of the
stat. 1 Rich. 3.

- (45.) Thus all the questions concerning the capacity of persons to stand seised to a use are avoided in the case of modern trusts; as the courts of equity fasten the trust upon the estate, and not upon the person. So there could be no implied use upon a lease for years^m, but trusts by implication are perhaps more frequent upon terms for years, than any other kind of propertyⁿ. The wide difference in their construction between a modern trust of

^m This is a point universally acceded to by writers on the subject. See the cases before cited, and

Perk. f. 596. Dyer, 10. a.

ⁿ See also many other instances, post, ch. 3.

a term of years, and a use before the statute of uses, forms, in my opinion, a very conclusive reason in favour of the position before submitted, that the former never has been, nor can be, considered as the use described by the statute 1 Rich. 3.

Sect. VI.

The operation
and effect of the
stat. 1 Rich. 3.

I shall now add the authorities, confirming the points in question; from which it will be perceived, that although the court of chancery, soon after the death of Hen. 8. had in some measure overcome its scruples, by allowing the *subpœna* to issue against the lessee for years, being a trustee; it was not till after the reign of Elizabeth, that the trusts declared upon a term were held even assignable in equity; it being at the same time recollected, that a *use* was always transferable in chancery².

(46.)

It may not be improper to premise, that the title of the act of 1 Rich. 3. c. 1. is in these words: "All acts made by or against a *cestuique use* shall be good against him, his *heirs*, and *feoffees in trust*." It would be

² Upon examining the reference to Brooke, pl. 60. and Crompton, 66. a. in the preceding edition of this work, there appears to be a mistake in the passage. The words in the original are, "*notwithstanding the*

"statute 1 Rich. 3." Upon consideration, however, the reference is evidently to the statute 3 Hen. 7. c. 4. and not to the statute of Richard; and consequently not applicable to this place.

Sacr. VI. impossible to use words more inapplicable to
 The operation and effect of the
 stat. 1 Rich. 3. a trust declared upon a possession of a lessee
 or assignee for a term of years. The word
seised, in the statute of uses 27 Hen. 8. was
 held sufficiently expressive to exclude leases
 or terms for years: it appears to me, that the
 words "*feoffees* and *heirs*," as fully express
 the meaning of the legislature.

(47.) The lord chancellor, in Easter term 22
 Eliz. ², put this question to the judges: A.
 being possessed of a lease for a term of years,
 granted all his *estate* and *interest* to B. and C.
 and their assigns, to the use of the said A. and
 his wife, for the term of their lives, and of
 the longer liver of them; and afterwards the
 said A. gave to a stranger such interest as he
 then had in the said lands in lease, and died:
 whether this grant made by A. gave all the
 term of B. and C. or not? And it was an-
 swered by all the justices and the chief
 baron, that the gift or grant of him, in trust
 for whom the term was granted, was void
 and out of the *statutes of cestuique use*: and
 in a note by the editor it is said, "*and 1 R.*
" (c. 1.) and 27 Hen. 8." for which he cites
 Ridley's case. The observation, which
 Crompton (who wrote in the latter part of
 Elizabeth's reign) makes upon the case from
 Dyer, is much to the purpose; "*Mes done*

" d'un terme pur ans al use est bon matter a SECT. VI.
 " *c'est jour* in conscience, et que il avera *sub-* The operation and effect of the
 " *pœna* in le chauncerie^a." This remark stat. 1 Rich. 3.
 clearly proves, that cestuique trust of a term
 was not *formerly* entitled to the subpœna.

Jenkins, mentioning this case (244, case 29), says, " The husband cannot assign this
 " *trust*, for a *trust is nothing in law*, and uses
 " being abolished and joined to the posses-
 " sion, this *trust* cannot be said to be a *USE*." In page 245, he adds, " Equity gives relief
 " upon a devise; but not upon an *assignment*
 " of a *trust*." It must be observed, that Jen-
 kins was speaking of the *trust* of a *term for*
years.

In the case of sir Moyle Finche^b it was
 resolved by all the justices, " that a *trust*
 " could not be *assigned*, because it was a mat-
 " ter in privity, and was in nature of a chose
 " in action, for *cestuique trust* had no power
 " of the land, but only to seek remedy by
 " *subpœna*, and not like to *cestuique use*, for
 " thereof there should be *possessio fratris*, and
 " he should be sworn on juries in respect of (48.)
 " the use, and he had power over the land by
 " the statute of 1 Rich. 3."—Here then the

^a Crompton, 66. a. See in favour of a *cestuique*
 also *Rooke v. Staples*, Car- trust of a term.
 ry's Rep. 76. 21 & 22 Eliz. ^b 4 Inst. 85,
 where there was a decree

SECT. VI.

The operation
and effect of the
stat. 1 Rich. 3.

distinction contended for is acknowledged by all the judges, and afterwards by the chancellor; and it is observable, that sir Edward Coke, as an instance of the *trust* just described, cites the above-mentioned case from Dyer.

(49.) Gilbert, in his *Law of Uses**, is of opinion, that if A. had assigned over the *land* itself in the case taken from Dyer, it would have been good by 1 R. 3.; but the words he used were not sufficient to pass the land itself, for he had no *interest* therein. But of this notion it is sufficient to observe, that it is not only directly contrary to the authorities before quoted, and to the reason of the thing, but would, if adopted, subvert the established practice of the profession. Besides, there is an evident absurdity in the distinction between the grant of the *land* itself and of an *interest* therein; for it is clear, that the statute 1 R. 3. gave *cestuique use* an *interest* in the land; and therefore if *cestuique trust* of a term had been considered as a *cestuique use* under that statute, the grant of his *interest* would have been as operative, as the grant of the *land* itself, for the purpose of passing the legal estate in the term^d.

* *Gilb. Uses*, 169.

^d Vide *Co. Litt.* 345. b.
3 *Co.* 24. a.

In a late case* where there was an outstanding satisfied term of years (and consequently attendant upon the inheritance), it was argued, that this term was within the stat. Rich. 3.; and that the legal interest therein passed by a conveyance of the inheritance. But it was unanimously held, that the statute Rich. 3. was not applicable to that case.

Sect. VI.

The operation
and effect of the
stat. 1 Rich. 3.

The judges in the above case seem to consider the statute 1 Rich. 3. as applicable to certain cases, which may now occur. The words of Mr. justice Lawrence are, "With regard to the statute 1 Rich. 3. it does not seem to me to be applicable to this case. The legislature, in passing that act, only intended, that where a person, having an estate in possession, conveyed it to a trustee to his own use, and afterwards conveyed it to a purchaser, he should not set up the estate in the cestuique trust (*trustee*) against the purchaser: that is, that he should not take advantage of his own fraud, and say, that the conveyance to the purchaser was defective on account of the legal estate not being in him, but being in his trustee."

In *Blake v. Foster**, the same judge observed, that although the statute 1 Rich. 3.

* Goodtitle dem. Jones
v. Jones, 7 Term Rep. 47.

* 8 Term Rep. 487. 491.

SECT. VI. did not apply to the case just mentioned,
 The operation and effect of the
 stat. 1 Rich. 3. "on further consideration the court were of
 "opinion, that it extended to other cases."

I have not, upon the most attentive consideration, been able to discover any case, to which the statute 1 Rich. 3. is now applicable.

Previously to the statute of uses, property was divided into use and possession; and in all cases where both the use and possession were united in one person, he was complete owner of the legal and beneficial interest, to which united interests the statute of 1 Rich. 3. could not by any means extend. Since the statute of uses, 27 Hen. 8. if an estate be conveyed to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs, the possession or legal estate is vested by virtue of the statute in B.: but the use limited to B, was the use to which the statute of 1 Rich. 3. applied; and the statute of uses, by converting the use into a legal estate, has virtually deprived the statute 1 Rich. 3. of the interest, upon which it operated*. The trust declared for C. was an interest unknown before the statute of uses.

* This point is properly suggested by Mr. Sugden in his edition to Gilb. Law of Uses and Trusts, 67. to whose note I must beg to refer,

The same observation will apply to the case of a conveyance unto, "*and to the use of,*" B. and his heirs, in trust for C. and his heirs: for although in this case the legal estate is not vested in B. by virtue of the statute of uses, the use to which the statute 1 Rich. 3. applied, is limited to B.; and by the union of the use and possession in him, he has every legal and beneficial interest known before the statute of 1 Rich. 3. That statute cannot fairly be applied to a fiduciary interest, created subsequently to it, in consequence of the constructive operation of the statute 27 H. 8.

SECT. VI.

The operation
and effect of the
stat. 1 Rich. 3.

The remaining case, to be considered, is the special trust before noticed. A conveyance is made to A. and his heirs, without any express declaration of the use, upon trust, or to the intent, that he shall convey to B.; or to the intent, that he shall be a tenant to the præcipe for suffering a common recovery; or to the intent, that he shall reconvey to the grantor. In all these cases, a seisin is transferred to B. by the course of the common law: and as the special trust or intent must necessarily prevent the use from resulting to the grantor, the grantee must have a complete legal estate without the aid of, and unaffected by, the statute of uses 27 H. 8. That statute uses the word *trust*, as well as *use*, and assisted by the former word, it may extend to be-

Sper. VI. neficial interests, not within the statute 1 Rich. 3.
The operation and effect of the stat. 1 Rich. 3. 3.; as for instance, to the trust declared upon the estate of tenant for life; and, as it is conceived, to the use or trust declared upon the seisin of tenant in tail. But there is no ground to contend, that the stat. 1 Rich. 3. which adopts the word "*use*" only, can extend to any fiduciary interest not executed at this time by the statute of uses: that the word *use* in the statute 1 Rich. 3. should have a more extensive operation, than in the statute 27 Hen. 8.

The practical consequences would be extremely injurious, if special trusts of this kind were considered within the stat. 1 Rich. 3. Thus, if a tenant in tail conveyed for the purpose of making a tenant to the praepice for suffering a recovery, which recovery when suffered should enure to the use of himself in fee; he might, by inadvertently conveying the freehold previous to suffering the recovery, render such recovery inoperative. Other cases might be produced of a similar nature.

It remains to be observed, that by the statute of 50 Ed. 3. c. 6. the special trust there noticed, was subject to an execution by a creditor of the cestuique trust; but the estate of cestuique use was not extendible till the 19 H. 7. c. 15. From this it appears, that the

legislature did not consider the use and special trust to be the same.

Sect. VI.

The operation and effect of the stat. 1 Rich. 3.

Of the alienation of cestuique use in remainder, &c.

(3.) Perkins says^f, "If cestuique use be of a reversion, he may grant the same as well as if he were in possession, and that by the statute of Richard 3. made in the first year of his reign, *cap.* 1." But Perkins, in this instance, cites no authority in support of his assertion, and he is clearly wrong. His position is contradicted by the determination in Delamer's case^g, in which it was decided, that the statute only intended to give the *present* possessor of the use a power of alienation, and did not extend to those in remainder or reversion^h. Upon the same principle, the statute did not extend to cestuique use, who had only a naked right to the use, the establishment of which depended upon the entry of his feoffeesⁱ. But if the feoffees to uses had been disseised, and cestuique use had released to the disseisor; or if the disseisor had enfeoffed cestuique use, who had enfeoffed a stranger: in either case, the entry of the feoffees was barred^k.

(50.)

^f Perk. s. 98. Perkins is also wrong (as the authorities before cited prove), when he asserts, that tenant in tail, for life, or for years, could stand seised to an express use before the statute 27 Hen. 8. See Perk. 537.

^g Plowd. 348. 350. 1 Co. 128. a. b.

^h Bro. Feof. al. Uses, pl. 44. B. N. C. 75.

ⁱ Plowd. 351. Gilb. Uses, 27, 28.

^k Plowd. 351, 352.

SECT. VI.

The operation
and effect of the
stat. 1 Rich. 3.

(51.)
Of leases by
cestuique use
in fee.

(4.) Cestuique use, by this statute, might have made a lease for years, rendering rent, for which he might have brought his action, but could not have avowed¹: and a reservation of rent by cestuique use, would have carried it to the heir, although not particularly named for that purpose^m. But notwithstanding cestuique use was enabled to make a lease for life or years, the reversion was still in the feoffees, who might have brought an action notwithstanding the want of privityⁿ.

Of devises by
cestuique use.

(5.) Cestuique use could not *devise* the *lands* by the equity of 1 Richard 3°. This construction was adopted for obvious reasons. Although the statute established the legal conveyances of cestuique use, neither the words, nor the equity of it, enabled him to convey the possession of his trustees by an instrument at that time, not applicable to the transfer of real property: for lands before the statute 32 Hen. 8. were not devisable.

Where cestui-
que use was al-
so the lord or
grantee of a rent-
charge.

(6.) It was also said, that if a lord, or a grantee of a rent-charge, had been also ces-

¹ 27 Hen. 8. 13. Bro.
Feof. al. Uses, pl. 6.

^m Ibid. pl. 18.

ⁿ Year Book 5 Hen. 7.
5. b. See the Year Book
27 Hen. 8. 13. b. "If
" *cestuique use* in fee make
" a gift in tail, of whom

" shall the tenant in tail
" hold? *Deinshil.* Comm
" me semble de nulluy.
" *Fitzh.* Bien dit, par ma
" foi, il est cler q'il tient de
" les feoffees."

^o Dy. 74. a, 143. a,

tuique use of the *land*, and after the statute of 1 R. 3. cestuique use had made a feoffment in fee; although the land passed from the feoffees, and his feoffment was warranted by the statute, yet the seignory or rent-charge was extinguished°. And further, it was determined, that the land of cestuique use was bound by his statute merchant, statute staple, and by elegit, by the statute 1 Rich. 3^d.

SECT. VI. 1

The operation and effect of the stat. 1 Rich. 3.

(52.)

VII. But to proceed in the historical account of uses: Richard the third, when duke of Gloucester, had frequently been made feoffee to uses. Now as the king could not be seised to a use, upon the assumption of the crown, Richard would have held the lands discharged of the uses. Therefore, as sir William Blackstone observes¹, to obviate so notorious an injustice, an act of parliament² was immediately passed, which ordained, that where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had not been named; and that where he stood solely enfeoffed, the estate itself should vest in cestuique use, in like manner as he had the use.

SECT. VII.

The history of uses continued to 23 Hen. 8. (54.)

(55.)

° Co. Litt. 52. a. Gilb. Uses, 31.

¹ Year Book 7 Hen. 7. 6. Bro. Feof. al. Uses, pl. 25.

² 2 Com. 332.

¹ 1 Rich. 1. c. 5. Those lands, whereof the king was enfeoffed jointly with others to the use of the feoffor, shall be in his co-feoffees.

SECT. VII.

The history of
uses continued
to 23 Hen. 8.

The first act of parliament, which passed in the succeeding king's reign, related to uses^c. The statute 1 Hen. 7. made a *formedon* maintainable against the pernors of the profits of land enfeoffed to uses. It also allowed the tenant in the same action to have *aid prayer, voucher, age*, and other advantages.

This statute, which gave a *formedon* only by express name against *cestuique use*, was construed to extend to a *scire facias* to execute an estate tail in remainder by equity^d. But in the construction of this act, it was held in a case^e, where a *scire facias* was brought against the pernor of the profits,

"First, that where divers of the king's subjects having cause of action by *formedon* in the descender, or else in the remainder, by force of any tail for lands and tenements, be defrauded and delayed of their said actions, and oftentimes without remedy, because of feoffments made of the same lands and tenements to persons unknown, to the intent that the demandant should not know, against whom they shall take their actions; it is ordained, that the demandant in every such case have his action against the pernor or per-

nors of the lands, &c. demanded, whereof any person or persons had been enfeoffed to his or their use; and the same pernor or pernors named as tenant or tenants in the said action, have the same vouchers, and their lieu thereupon, *aid prayer*, and all other advantages, as the same pernor or pernors should have had, if they were tenants indeed; or as their feoffees should have had, if the same action had been conceived against them,"

&c.

^d 1 Co. 131. b.^e 11 Co. 62. b.

that the pernor should not vouch; for it should be intended in such action, in which he might vouch: and that the words of the act did not alter the law of vouchers, and give to the pernor any new voucher.

SECT. VII.

The history of
uses continued
to 23 Hen. 8.
(56.)

Among the inconveniences, which attended the introduction of uses, it was found, that lords lost the benefit of wardship; and, therefore, by a statute 4 Hen. 7. c. 17. the statute of Marlbridge was confirmed; and it was also provided, that the heir of cestuique use of lands held by knight service, being within age, should be in ward; and being of full age, should pay relief. On the contrary, for the benefit of the heir of cestuique use, the same statute provided, that he should have an action against his guardian committing waste.

By the 19 Hen. 7. c. 15. the lands of cestuique use were made subject to execution for his debt, by judgment, recognizance, statute merchant, and of the staple. The lands of cestuique use holden *in soccage*, were also made liable to satisfy the lord his relief, heriot, and other duties. Cestuique use also was allowed to have the same advantages he might have had, if he had been tenant of the land. And, lastly, the lands of cestuique use, being a bondman, were made seizable by the lord.

(57.)

. SECT. VIII.

Of the statute
23 Hen. 8. and
the construction
thereof.

(58.)

VIII. We have seen, that by the statute of 15 Rich. 2. c. 5. lands conveyed to the use of religious houses, or bodies corporate, were amortized by license from the crown. But that statute did not extend to conveyances in trust for parish churches, chapels, churchwardens, companies, fraternities, &c. erected by *common assent*, and not being bodies corporate. Now these alienations were as prejudicial to the lords, as alienations in mortmain: for they thereby lost their wards, heriots, reliefs*, &c. To remedy this mischief the statute of 23 Hen. 8. c. 10. was made. It recites, " That by reason of feof-
" ments made of trust of manors, &c. to the
" use of parish churches, chapels, churchwar-
" dens, guilds, fraternities, commonalties,
" companies, or brotherhoods, erected or
" made of devotion, or *by common assent* of
" the people, *without any corporation*, and to
" the uses and intents to have obits perpetual,
" or any continual service of a priest for ever,
" &c. or to any other like uses and intents,
" there groweth to the king our sovereign
" lord, and to other lords and subjects of the
" realm, the same like losses and inconve-
" niences, and is as much prejudicial to them,
" as doth and is in case where lands are alien-
" ed in mortmain: be it therefore enacted,

* 1 Co. 23. b.

“That all and every such uses, intents, and
 “purposes, of what name, nature, or quality
 “the same shall be called, &c. shall be ut-
 “terly void; and if any person, in default of
 “this statute, do bind their heirs, &c. that
 “then every such pain, penalty, craft, co-
 “lour, and every other thing, &c. shall be
 “utterly void: and that this statute shall be
 “always interpreted, &c. most beneficially to
 “the destruction of such uses, &c. and of
 “all other like uses and intents.”

SECT. VIII.

Of the statute
 23 Hen. 8. and
 the construc-
 tion thereof.

I shall make a few observations on this statute.—In the first place, it was made to prevent conveyances of land, &c. in trust for superstitious purposes, such as to pray (59.) for souls supposed to be in purgatory; but it was not intended to prevent alienations in trust for good and charitable purposes; such as finding of a preacher, maintenance of a school, relief and comfort of maimed soldiers, sustenance of poor people, reparation of churches, highways, bridges, causeways, discharging of poor inhabitants of a town of common charges, for making of a stock for poor labourers in husbandry, and poor apprentices, and for the marriage of poor virgins, and other like charitable uses; for, as it has been properly observed, “no time has been so barbarous as to abolish

SECT. VIII. "learning and knowledge, nor so uncharitable as to prohibit relieving the poor^c."

Of the statute 23 Hen. 8. and the construction thereof.

(60.) 2dly. This act did not make the conveyance itself void, nor did it give the lord any title to enter for mortmain (like the 15 Richard 2. c. 5.): but it made the use void. Therefore if the feoffment had been within this statute, the feoffees (if no consideration had been expressed) would have stood seised, notwithstanding the declaration of uses, to the use of the feoffor and his heirs; but if there had been a consideration, though merely nominal, the use would have vested in the feoffees^d.

SECT. IX. IX. I have now noticed all the statutes, which I am aware of, relating to uses, previously to the statute of 27 Hen. 8. c. 10. These statutes all tend to consider *cestuique use* as the real owner of the land; and indeed he was made completely so by the statute 27 Hen. 8. c. 10. But it will be necessary, in this place, to consider the learning of uses before that statute was enacted. Uses had undergone many refinements; and although several acts were passed to prevent the injustice, which these refinements pro-

The requisites to be observed in raising uses.
(61.)

^c 1 Co. 24. a. 26. a. *Attorney General v. Wood*
^d 1 Co. 24. a. See *Attorney General v. Wood*, 1 Ves. 536.

duced; yet none of them were found effectual to remedy the evil.

SECT. IX.

The requisites
to be observed
in raising uses.
(62.)

I shall now consider the requisites to be observed in raising uses.

(1.) There should have been a person or persons capable of standing seised to a use. Generally every common person not incapacitated to take, by way of grant, could stand seised to a use: and, therefore, a feme covert, or an infant, might have stood seised to a use^a.

A person capable of standing seised to a use.

A use was before described to be a trust or confidence; which was not issuing out of land, but as a thing collateral, annexed *in privity to the estate*, and to the *person* touching the land. It follows from this explanation of a use, that whenever the legal estate vested in a person, in whom the *confidence of person*, or *privity of estate failed*, the use was either destroyed, or for a time suspended.

Therefore, a lord by escheat, or of a villein, could not stand seised to a use; because the title of the lord accrued to him either by reason of the seignory of the land, or of the villein; which title was higher than the use,

As to privity of estate.
(63.)

^a Ba. Uses, 58. Bro. Feof. al. Uses, p. 51. Shep. T. 516.

SECT. IX.

The requisites
to be observed
in raising uses.

or confidence, and therefore could not be subject to it. And the same rule applied to a lord, who entered for mortmain, or who recovered by a cessavit, &c. for his title was paramount to the use^b.

Tenant by the curtesy could not stand seised to a use; for he was *in* by the act of law in consideration of marriage, and was not *in* in privity of estate^a. And it seems, by the better opinion, that a tenant in dower could not stand seised to a use^d; and that for the same reason. This point, however, has been doubted by Gilbert, though he seems to acquiesce in it in another place^e. So neither could a disseisor, abator, nor intruder, stand seised to a use, although he had notice^f. So if a feoffee to uses had bound himself in a statute, &c. and the conuzee had taken out execution thereupon, he would have held the land discharged of the uses^g.

(64.)

Confidence of
person.

Although there had been *privity* of estate, yet if *confidence*, either expressed, or implied, failed in the person, the use was destroyed, or suspended. Thus, if a feoffee to uses had for a valuable consideration enfeoffed another,

^b 1 Co. 122. a. 139. b.
B. N. C. 60.

^c 1 Co. 122. a.

^d Ibid. See 22 Vin. 184.
and the cases collected in
the notes to pl. 15. 16.

^e Gilb. Uses, 11. 171.

^f 1 Co. 122. a. 139. b.

^g Bro. Feof. al. Uses, pl.
10.

who had no notice of the former uses, there was privity of estate, but no confidence in the person of the second feoffee; and consequently the use was gone^b. If the feoffment had been made without consideration to a person, who had no noticeⁱ; or upon a valuable consideration to one, who had notice^k; in each case the privity of estate, and confidence in the person, were preserved; and the feoffee took the estate subject to the former uses.

SECT. IX.

The requisites
to be observed
in raising uses.

If there had been tenant for life, remainder in fee to the use of another, and the tenant for life had made a feoffment to one, who had notice; the feoffee could not have stood seised to the former use; for that use was annexed to one estate, and he was in of another^l.

(65.)

The king could not stand seised to a use; and therefore if lands had been conveyed to the king and a subject, *pour term de leur vies*, to certain uses, such uses were void as to a moiety of the lands^m. Neither could the queen be a feoffee to usesⁿ.

^b 1 Co. 122. b. Abbot of Bury v. Bokenham, Dy. 8, 33 Hen. 6. 16.

ⁱ 1 Co. 122. b.

^k Plowd. 351. Year Book 5 Ed. 4. 7.

^l 1 Co. 122. b.

^m Year Book 7 Ed. 4. 17. Ba. Uses, 56, 57. Berkeley's case. Plowd. 238. (e). See the cases collected in notes to pl. 4. in 22 Vin. 182.

ⁿ Bac. Uses, 57.

SECT. IX.

The requisites
to be observed
in raising uses.

A corporation, abbé, mayor, commonalty, and persons attainted^o, were under the like disability. So in a case, where an alien and another person were enfeoffed to uses, the crown became entitled to a moiety of the land discharged of the uses^p.

(66.)

I have already stated the grounds and authorities, upon which I conclude, that neither tenant in tail, for life, nor years, could stand seised to a *use*. It must be added, that an occupant should not stand seised to a use^q.

A person capable of receiving or taking the use.

(2.) There should have been a person capable of receiving or taking the use.

As to this point it may be observed, that all persons capable of taking a conveyance of the lands, might have taken the same estate by way of use; therefore the limitation of a use to a corporation was good, if a license for that purpose had been obtained^r. So the king could have been cestuique use by matter of record; and therefore if a fine had

^o B. N. C. 60. Bro. Feof. al. Uses, 40. 1 Co. 122. a. Ba. Uses, 57, 58, 59. Dy. 8. b. See Halfpenny's case, Year Book 14 Hen. 8. 8. a. 23 Vin. 182, 183. and the several cases collected in note to pl. 6. as to a corporation.

^p King v. Boys, Dy. 283. b. See cases collected in note to pl. 18. in 22 Vin. 184.

^q Bro. Feof. al. Uses, pl. 10. 22 Vin. 183. pl. 7. The case in Hard. 468. was a *trust*, and not a *use*.

^r Shep. T. 509.

been levied, or recovery suffered, and the use declared to the king by deed inrolled, the king would have been entitled as cestuique use, though he was not a party to the declaration¹. But it was absolutely necessary, that both the declaration and conveyance should be matter of record.

SECT. IX.

The requisites to be observed in raising uses.

The limitation of a use to the parishioners of any particular place was void². (67.)

Whether an alien could have been cestuique use was an undetermined point; some holding, that a use, being merely in conscience, equity might have directed the execution of it for the benefit of the alien³; whilst others contended, that an alien could not have compelled the feoffees to execute the use; it being contrary to the policy of the law of the kingdom, that an alien should plead or be impleaded touching lands in any of our courts⁴.

(5.) There should have been either a consideration to raise, or a declaration of, the use. Indeed, where an express declaration of the

A consideration or declaration of the use.

¹ Bac. Uses, 60.

² Year Book 13 Hen. 7. 9. b. Bro. Feof. al. Uses, 20. Shap. T. 509. See 22 Vin. 247. (E. a.)

³ 12 Hen. 7. 28. a. Bro. Feof. al. Uses, pl. 29. Allen, 14. Vide Preamble to

the Stat. 27 Hen. 8. c. 10.

⁴ Gilb. Uses, 43. Allen, 15, 16. Styles, 40. Ba. Uses, 48. See 22 Vin. 247. and cases collected in note to pl. 1. See post, whether an alien may be cestuique trust at this day.

SECT. IX.

The requisites
to be observed
in raising uses.

(68.)

use was made on the feoffment, a pecuniary consideration, or the want of it, could not vary the use so declared^w. Therefore, if A. had delivered money to J. S. for the purpose of purchasing lands for him, and J. S. had purchased them *to his own use*, no use could have resulted to, or be implied in, A.^x So if A. in consideration of 100*l.* paid to him by B. had enfeoffed B. and C.; the declaration of the use to B. and C. would have been good, notwithstanding the payment of the money by B. only^y.

When no declaration of the use was made, the consideration paid by the feoffee or grantee created a use for him. If neither a consideration had been paid or reserved, nor a declaration made, the use would have resulted to the grantor^z, and he would have been *in* as of the old use. It was therefore determined, that if a man, seised *ex parte materna*, had made a feoffment, levied a fine, or suffered a recovery without having declared the use, and without consideration, the use would have resulted to him and his heirs on the part of his mother^a. This observation will apply

(69.)

^w Perk. S. 537. See Calthorp's case, Moor, 102. 1 Co. 176. b.

^x Bro. Feof. al. Uses, 40. See *infra*, chap. 3. as to trusts.

^y Same's case, 2 Roll. Ab. 791.

^z Perk. 533.

^a 1 Co. 100. b. Har. Co. Litt. 12. b. N. 2. 2 Salk. 591. 3 Lev. 406. 2 Roll. Ab. 780. 2 P. W. 139. See 22 Vin. 184. pl. 4, 5. and the cases collected in the notes.

to the conveyance by lease and release, as I shall endeavour hereafter to explain. So if there had been two joint tenants, the one in fee, and the other for life, and they had levied a fine without having declared the use, it would have resulted to them according to their estates or interests in the land^b. In like manner, if A. seised in fee of an estate, had joined with B. in levying a fine, without a declaration of the use, it would have resulted to A. *only*, and his heirs^c.

SECT. IX.

The requisites to be observed in raising uses.

It should seem, that any pecuniary consideration, however trifling it might have been, or any rent reserved, however inconsiderable, would have been sufficient to raise the use to the feoffee, conuzee, or recoveror^d.

The above remarks applied only to conveyances *in fee*. The conveyance or creation of estates *tail*, for *life*, or *years* (so far as related to the doctrine of uses), depended upon different principles^e.

(70.)

In respect of grants of *incorporeal* property, it must be noticed, that if a man seised of a rent-charge in fee, had made a conveyance of it, without having declared the use, and without any consideration, the

^b Beckwith's case, 2 Co. 58. a.

^c Ibid.

^d Porter's case, 1 Co. 24. a. 2 Roll. Ab. 787, 788.

^e See ante, 40 to 50.

SECT. IX.
The requisites
to be observed
in raising uses.

grantee would have stood seised to the use of the grantor and his heirs^f. But if the proprietor of lands had granted a rent-charge thereout unto a stranger, the law would not presume, that such grant was intended for the grantor's use, though no use had been declared, nor consideration paid^g; and upon a conveyance of a seignory or rent in tail, for life, or for years, without declaration of the use, and without consideration, the grantee would have been seised to his own use^h.

A substance or
hereditament.

(71.)

(4.). There should have been a sufficient substance or hereditament, out of which the use might have arisen. Thus, all local inheritances, as lands, houses, rents in esse, reversions, remainders, liberties, and franchises, might have been conveyed to uses. But it was different as to personal inheritances, such as annuities. So, it was said, that uses could not have been raised out of such things, *quæ ipso usu consumuntur*, as commons, ways in gross, or authorities granted to a man and his heirs to hunt in a park, chase, or forestⁱ.

SECT. X.
The properties
of a use.

X. I shall now examine the properties of the use.

^f Perk. S. 530.

^g Ibid. 531.

^h Ibid. 537.

ⁱ Wm. Jones, 127.

(1.) It was descendible according to the rules of the common law respecting estates of inheritance^a; the courts of equity having, in this instance, adopted the maxim, *equitas sequitur legem*. There might have been a *possessio fratris* of a use^b; though indeed lord Bacon calls this a vulgar opinion^c; observing, that it meant nothing more, than that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear. The rule, however, was certainly established in chancery.

SECT. X.

The propriety of a use. It was descendible.

(72.)

So the use of lands held in borough English would have descended to the youngest son, and that of gavelkind to all the sons^d; and where there was a custom of a manor, that the lands should descend to the eldest daughter, in default of sons, it was determined, that the use should descend in like manner^e.

^a 2 Roll. Ab. 780. If a man holds of the king before the statute of uses, and infeoffs others to his own use during his life, with remainder over in tail, remainder to his right heirs, and dies; the reversion descends to the heir. Bro. Lit. v. 1, pl. 61. So if the ultimate limitation of the use was to the grantor's right heirs, although no express particular use was limited

to him. Sir John Hussey's case, Bro. Noms, pl. 1. 40. March. N. C. 87. Dyer, 133. pl. 6. See post, 135.

^b Year Book 5 Ed. 4. 7. b. 1 Co. 88. a. 121. b. 4 Co. 22. a. Co. Litt. 19. b. Dy. 10, 11. Plowd. 58.

^c Bac. Uses, 11.

^d 2 Roll. Ab. 780. 1 Co. 86. a.

^e 2 Roll. Ab. 780.

SECT. X.

The properties
of a use.

It was devis-
able.

(2.) The use was devisable before the statute of wills. After the conquest a devise could not operate upon the lands; because, by the common law the ceremony of livery of seisin was necessary to the transfer of them; and because it was contrary to the nature of a feud, that the feudatory should dispose of it by will. But the courts of equity, under the colour of allowing a devise of the use, did in effect permit the legal interest in the lands to be devised^f. An infant however was disabled from devising the use^g,

(73.)

It was alien-
able.

(3.) As cestuique use might have devised, so he might have aliened or transferred the use^h; and by the statute 1 Rich. 3. he might have conveyed the legal estate. But it is observable, that in the case of a feme covert, a fine was necessary to pass her useⁱ.

Cestuique use
had neither *jus*
in re, nor *ad*
rem.

(4.) But cestuique use, in respect to the legal ownership of the land, had neither *jus in re*, nor *ad rem*^k. Therefore when in possession, he was considered merely as tenant by sufferance^l. He could not bring an ac-

(74.)

^f See Wright's Ten. 172. 174. ed. 1768. Year Book 10 Hen. 7. 26. 27 Hen. 8.

7. 1 Co. 123. b.

^g See Year Book 21 Ed.

4. 24. 2 Roll. Ab. 779.

^h Bro. Feof. al. Uses, pl.

44. B. N. C. 75. Plowd.

350. Bac. Uses, 16.

ⁱ Year Book 7 Ed. 4. 14.

^k 1 Co. 121. b. W. Jones, 127. Bac. Uses, 5.

^l Year Book 15 Hen. 7.

2. 4 Ed. 4. 8. Bro. Feof.

al. Uses, 39. Plowd. 3. a.

(Basset v. Manxell.) See

22 Vin. 286. pl. 2, 3. and

tion, avow, nor justify for damage faisant in his own name^m. When he made a lease pursuant to the statute 1 Rich. 3. the reversion still continued in the feoffees, who might have brought an action for waste, or have entered for a forfeitureⁿ. By force of the last-mentioned statute, he might have granted the herbage or corn, yet he could not have taken them for his own use^o. So his wife was not dowable of the use^p; and the husband of feme cestuique use could not have his curtesy^q. Cestuique use did not forfeit his lands for treason nor felony^r; and the use was not considered as assets in the hands of the heir, nor executor, to satisfy creditors^s.

Sacr. X.

The properties of a use.

The several statutes before enumerated, and the preamble of the statute 27 Hen. 8. c. 10. point out other inconveniences attending the above principle, that cestuique use had no legal right nor title to the lands.

(75.)

the cases collected in the note to pl. 3. It should seem from Hard. 491. that he was considered as tenant at will, and might therefore have taken a release. But cont. Bac. 24. Sem.

^m Bro. Feof. al. Uses, pl. 39. 13 b.

ⁿ Ibid. 26. Year Book 5 Hen. 7. 5.

^o Bro. pl. 13. 5 Hen. 7. 2.

^p Perk. S. 349.

^q Ibid. 463. 1 Co. 123.

b. ^r Jenk. Cent. 190. Year Book 5 Ed. 4. pl. 18.

^s 1 Co. 121. b.

§ 32. X₆

The properties
of a use.
Cestuique use
might have
been sworn
upon an in-
quest.

(5.) Cestuique use, indeed, might have been sworn upon an inquest[†]; but this rule was established under particular circumstances; for, as sir Edward Coke observes, at the time of making the statute 2 Hen. 5 c. 5 the greater part of the lands in the kingdom was held in use; an event occasioned by the unhappy controversy between the houses of York and Lancaster. Now that statute was made to remedy a mischief, which happened from the sheriffs having frequently returned men of no understanding^u, and it therefore provides, that he should return proper men. The courts, therefore, for the advancement and expedition of justice, extended it (against the letter) to the cestuique use of lands, and not to his feoffees.

The feoffee was
complete own-
er.

(76.)

(6.) As to the feoffee, he was complete owner of the land at law. He performed the feudal duties^w; his wife had dower^x; and his estate was subject to wardship, relief, &c. He had power of selling the lands, and forfeited them for treason or felony. In short, he might have brought actions, and have exercised every kind of ownership over, or in respect of, the lands^y.

[†] Co. Litt. 272. a.

^u See Year Book 15 Hen. 7. 13.

^w See note 1. Butl. Co. Litt. 271. b.

^x Bro. Feof. al. Uses, pl. 10.

^y Dy. 9. b. Jenk. 190, and the several cases before cited.

(7.) We have seen, that the use did, in some instances, ensue the nature of the land; as in cases of descent, and where it had been declared, or resulted, to the grantor, or feoffor. But, uses, as Bacon observes, differed in many instances from cases of possession. Thus, by the common law, warranty could not have bound the right of a use, as it would have done the right of possession^a. There was no necessity at common law for a consideration to establish a deed, nor did notice constitute covin: but it has already been explained, how materially a conveyance to uses was affected by the want of a consideration, or by notice. In the case of possession, a rent out of land, and the land itself, cannot stand together: but it was otherwise in the case of a use. To the above differences, mentioned by Bacon^a, I may add; that the word, *heirs*, was necessary at common law to create an estate in fee-simple. But if a bargain and sale had been made before the statute of uses, the bargainee would have had an estate *in fee* in the use without the word heirs^b; because the bargainee having paid a valuable consideration, the courts of equity would have directed the use according to the intention of the parties. So if an estate had been limited at common law to a man, and to such woman as he

SECT. X.

The properties of a use.

Uses differed in many instances from cases of possession.

(77.)

^a Bac. Uses, 12.^b 1 Co. 100. b. Co. Litt.^a See Bac. Uses, from 11 9. b.

9. 18.

SECT. X. should afterwards marry, the man would have taken the whole^c; but the limitation of the use in the above manner would have been good^d. So if there had been a feoffment in fee to the use of A. for years, with remainder to the use of the right heirs of J. S. this contingent remainder would have been good; for the feoffees remained tenants of the freehold^e.

The statute 27
Hen. 8. c. 10.
(78.)

XI. Such then was the learning, and such the state of uses at the time, when it was deemed expedient to pass the statute 27 Hen. 8. c. 10. commonly called the statute of uses. They were attended, as the reader must have remarked, with considerable inconveniencies, and serious mischiefs; and they had hitherto baffled the partial attacks of the legislature. It was now found expedient to apply some effectual remedy to the evil; and it is said, that Henry the Eighth, being displeased at the loss of wardships, and at other injuries done to him, complained to the judges of the defect of the law in that respect; and that they hinted to him, "that if the possession might be joined to the use, all would go well^f." This advice probably laid the foundation of the statute of uses.

^c Moor. 96. pl. 240.

^d 1 Co. 101. a. Dy. 190.
pl. 17, 18.

^e 1 Co. 135. a.

^f 2 Leon. 17, 18.

The statute recites, "Where by the com-
 "mon laws of this realm, lands, tenements,
 "and hereditaments be not deviseable by tes-
 "tament, nor ought to be transferred from
 "one to another, but by solemn livery and
 "seisin, matter of record, writing sufficient
 "made *bonâ fide*, without covin or fraud; yet
 "nevertheless divers and sundry imagina-
 "tions, subtle inventions, and practices have
 "been used, whereby the hereditaments of
 "this realm have been conveyed from one
 "to another by fraudulent feoffments, fines,
 "recoveries, and other assurances, craftily
 "made to secret uses, intents, and trusts;
 "and also by wills and testaments sometime
 "made by *nude parol*, and words, sometime
 "by signs and tokens, and sometime by
 "writing; and for the most part made by
 "such persons as be visited with sickness, in
 "their extreme agonies and pains, or at such
 "time as they have scantly had any good
 "memory or remembrance; at which times
 "they being provoked by greedy and covet-
 "ous persons, lying in wait about them, do
 "many times, dispose indiscreetly and unad-
 "visedly their lands and inheritances; by
 "reason whereof, and by occasion of which
 "fraudulent feoffments, fines, recoveries, and
 "other like assurances to uses, confidences,
 "and trusts, divers and many heirs have been
 "unjustly, at sundry times, disherited, the
 "lords have lost their wards, marriages, re-

SECT. XL.

The statute 27
 Hen. 8. c. 10.

Preamble.

(79.)

Sact. XI.

The statute 27
Hen. 8. c. 10.
(80.)

(81.)

" liefs, harriots, escheats, aids *pur fair fits*
 " *chivalier, & pur file marier*, and scantly
 " any person can be certainly assured of any
 " lands by them purchased, nor know surely
 " against whom they shall use their actions,
 " or execution, for their rights, titles, and
 " duties; also men married have lost their
 " tenancies by the courtesy, women their
 " dowers; manifest perjuries by trial of such
 " secret wills, and uses, have been commit-
 " ted; the king's highness hath lost the pro-
 " fits and advantages of the lands of persons
 " attainted, and of the lands craftily put in
 " feoffments to the uses of aliens born, and
 " also the profits of waste for a year and a
 " day of lands of felons attainted; and the
 " lords their escheats thereof; and many
 " other inconveniencies have happened, and
 " daily do increase among the king's subjects,
 " to their great trouble and inquietness, and
 " to the utter subversion of the ancient com-
 " mon laws of this realm: for the extirpating
 " and extinguishment of all such subtle prac-
 " tised feoffments, fines, recoveries, abuses,
 " and errors heretofore used and accustomed
 " in this realm, to the subversion of the good
 " and ancient laws of the same, and to the
 " intent that the king's highness, or any
 " other his subjects of this realm, shall not
 " in anywise hereafter, by any means or in-
 " ventions be deceived, damaged, or hurt by
 " reason of such trusts, uses, or confidences,

" it may please the king's most royal majesty;
 " that it may be enacted by his highness, by
 " the assent of the lords spiritual and tem-
 " poral, and the commons in this present par-
 " liament assembled, and by the authority of
 " the same, in manner and form following,
 " that is to say, That where any person or
 " persons stand, or be seised, or at any time
 " hereafter shall happen to be seised, of and
 " in any honours, castles, manors, lands, te-
 " nements, rents, services, reversions, re-
 " mainders, or other hereditaments, to the
 " use, confidence, or trust of any other person
 " or persons, or of any body politic, by rea-
 " son of any bargain, sale, feoffment, fine,
 " recovery, covenant, contract, agreement,
 " will, or otherwise, by any manner of means
 " whatsoever it be; that in every such case
 " all and every such person and persons, and
 " bodies politic, that have, or hereafter shall
 " have, any such use, confidence, or trust, in
 " fee simple, fee tail, for term of life, or for
 " years, or otherwise, or any use, confidence,
 " or trust in remainder, or reverter, shall
 " from henceforth stand, and be seised, deem-
 " ed, and adjudged in lawful seisin, estate,
 " and possession, of and in the same honours,
 " castles, manors, lands, tenements, rents,
 " services, reversions, remainders, and here-
 " ditaments, with their appurtenances, to all
 " intents, constructions, and purposes in the
 " law, of and in such-like estates, as they had

SECT. XL

The statute 27
Hen. 8. c. 10.

The possession
shall be in him
or them that
have the use.

(82.)

Sect. XI.

The statute 27
Hen. 8. c. 10.

“ or shall have in use, trust, or confidence, of
 “ or in the same; and that the estate, title,
 “ right, and possession, that was in such
 “ person or persons, that were or hereafter
 “ shall be seised of any lands, tenements, or
 “ hereditaments, to the use, confidence, or
 “ trust of any such person or persons, or of
 “ any body politic, be from henceforth clearly
 “ deemed and adjudged to be in him or them,
 “ that have or hereafter shall have such use,
 “ confidence, or trust, after such quality,
 “ manner, form, and condition, as they had
 “ before in or to the use, confidence, or trust
 “ that was in them.

§. 2. Convey-
 ances made to
 different per-
 sons to the use
 of one or some
 of them.

(83.)

2. “ That where divers and many persons be,
 “ or hereafter shall happen to be, jointly seised
 “ of and in any lands, tenements, rents, re-
 “ versions, remainders, or other heredita-
 “ ments, to the use, confidence, or trust, of
 “ any of them that be so jointly seised; that
 “ in every such case, that those person or
 “ persons which have or hereafter shall have
 “ any such use, confidence, or trust, in any
 “ such lands, tenements, rents, reversions,
 “ remainders, or hereditaments, shall from
 “ henceforth have, and be deemed and ad-
 “ judged to have only to him or them that
 “ have or hereafter shall have any such use,
 “ confidence, or trust, such estate, possession,
 “ and seisin of and in the same lands, tene-
 “ ments, rents, reversions, remainders, and

" other hereditaments, in like nature, man- SECT. XI.
 " ner, form, condition, and course, as he or The statute 27
 " they had before in the use, confidence, or Hen. 8. c. 10.
 " trust of the same lands, tenements, or he-
 " reditaments: saving and reserving to all Saving of the
 " and singular persons, and bodies politic, right of stran-
 " their heirs and successors, other than those gers.
 " person or persons which be seised, or here-
 " after shall be seised, of any lands, tene-
 " ments, or hereditaments, to any use, con-
 " fidence, or trust, all such right, title, entry,
 " interest, possession, rents, and action, as
 " they or any of them had or might have had
 " before the making of this act.

3. " And also saving to all and singular Saving of the
 " those persons, and to their heirs, which be right scotches to
 " or hereafter shall be seised to any use, all their own use.
 " such former right, title, entry, interest, (84.)
 " possession, rents, customs, services, and ac-
 " tions, as they or any of them might have
 " had to his or their own proper use, in or to
 " any manors, lapds, tenements, rents, or
 " hereditaments, whereof they be, or here-
 " after shall be, seised to any other use, as if
 " this present act had never been had nor
 " made, any thing contained in this act to
 " the contrary notwithstanding^b.

^b Upon this clause, see 280. Cecil's case, 7 Co.
 Ferrers v. Fetmor, Cro. 19. b. 20. a. 2 Roll. Rep.
 Jac. 643. 1 Vent. 195. 245. 1 Mod. 107. See as

SECT. XI.

The statute 27
Hen. 8. c. 10.

(85.)

4. " And where also divers persons stand
" and be seised of and in any lands, tene-
" ments, or hereditaments, in fee simple or
" otherwise, to the use and intent that some
" other person or persons shall have and per-
" ceive yearly to them, and to his or their
" heirs, one annual rent of 10%. or more or
" less, out of the same lands and tenements,
" and some other person one other annual
" rent to him and his assigns, for term of life
" or years, or for some other special time, ac-
" cording to such intent and use as hath
" been heretofore declared, limited, and made
" thereof:

§ 3. The exe-
cution of rents.

5. " Be it enacted therefore by the authority
" aforesaid, That in every such case, the same
" persons, their heirs and assigns, that have
" such use and interest, to have and perceive
" any such annual rents, out of any lands,
" tenements, or hereditaments, that they and
" every of them, their heirs and assigns, be
" adjudged and deemed to be in possession
" and seisin of the same rent, of and in such
" like estate, as they had in the title, interest,
" or use of the said rent or profit, and as if
" a sufficient grant, or other lawful convey-
" ance, had been made and executed to them,

to a feoffment made by a the use of others, Isidore
"ord to his copyholders to case cited 7 Co. 39.

“ by such as were or shall be seised^e to the
 “ use or intent of any such rent to be had,
 “ made, or paid, according to the very trust
 “ and intent thereof; and that all and every
 “ such person and persons as have or hereafter
 “ shall have any title, use, and interest, in
 “ or to any such rent or profit, shall lawfully
 “ distrein for non-payment of the said rent,
 “ and in their own names make avowries, or
 “ by their bailiffs or servants make conisances
 “ and justifications, and have all other suits,
 “ entries, and remedies, for such rents^d, as
 “ if the same rents had been actually and
 “ really granted to them with sufficient
 “ clauses of distress, re-entry, or otherwise,
 “ according to such conditions, pains, or
 “ other things, limited and appointed upon
 “ the trust and intent for payment or surety
 “ of such rent.

SECT. XI.

The statute 27
 Hen. 8. c. 10.

(86.)

6. “ And be it further enacted, by the au-
 “ thority aforesaid; That, whereas divers per-
 “ sons have purchased, or have estate made
 “ and conveyed of and in divers lands, tene-
 “ ments, and hereditaments, unto them and
 “ their wives, and to the heirs of the hus-
 “ band, or to the husband and to the wife,
 “ and to the heirs of their two bodies be-
 “ gotten, or to the heirs of one of their bo-

^d Dyer, 362. b. pl. 21.

^e See upon this head Bascawin and Herle v.
 Cooke, 1 Mod. 228.

SECT. XI.

The statute 27
Hen. 8. c. 10.

“dies begotten, or to the husband and to
“the wife for the term of their lives, or for
“term of life of the said wife; (2.) or where
“any such estate or purchase of any lands,
“tenements, or hereditaments, hath been, or
“hereafter shall be made to any husband and
“to his wife in manner and form expressed, or
“to any other person or persons, and to their
“heirs and assigns, to the use and behoof
“of the said husband and wife, or to the use
“of the wife as is before rehearsed, for the
“jointer of the wife; (3.) that then, in
“every such case, every woman, married,
“having such jointer made, or hereafter to
“be made, shall not claim, nor have title to
“have any dower of the residue of the lands,
“tenements, or hereditaments, that at any
“time were her said husband’s, by whom
“she hath any such jointer, nor shall de-
“mand or claim her dower of and against
“them that have the lands and inheritances
“of her said husband; (4.) but if she have
“no such jointer, then she shall be admitted
“and enabled to pursue, have and demand
“her dower by writ of dower, after the due
“course and order of the common laws of
“this realm; this act, or any law or provi-
“sion made to the contrary thereof, notwith-
“standing.

7. “Provided alway, That, if any such
“woman be lawfully expulsed or evicted

" from her said jointer, or from any part
" thereof, without any fraud or covin, by
" lawful entry, action, or by discontinuance
" of her husband; then every such woman
" shall be endowed of as much of the re-
" sidue of her husband's tenements or here-
" ditaments, whereof she was before dowable,
" as the same lands and tenements, so evicted
" and expulsed, shall amount or extend unto.

Stat. XL

The statute 27.
Hen. 8. c. 10.

8. " Provided also, That this act, nor
" any thing therein contained or expressed,
" extend, or be in any wise hurtful or preju-
" dicial to any woman or women heretofore
" being married, of, for, or concerning such
" right, title, use, interest, or possession, as
" they or any of them have claim, or pretend
" to have for her or their jointer or dower of, in,
" or to any manors, lands, tenements, or other
" hereditaments of any of their late husbands,
" being now dead or deceased, any thing con-
" tained in this act to the contrary notwith-
" standing.

9. " Provided also, That if any wife
" have, or hereafter shall have any manors,
" lands, tenements, or hereditaments, unto
" her, given and assured after marriage, for
" term of her life, or otherwise in jointer, ex-
" cept the same assurance be to her made by
" act of Parliament, and the said wife after
" that fortune to outlive her said husband,

SECT. XI. " in whose time said jointer was made or as-
 The statute 27 "sured unto her, that then the same wife
 Hen. 8. c. 10. "so overliving, shall and may at her liberty,
 "after the death of her said husband, refuse
 "to have and take the lands and tenements
 "so to her given, appointed, or assured du-
 "ring the coverture, for term of her life or
 "otherwise in jointer, except the same as-
 "surance be to her made by act of Parlia-
 "ment, as is aforesaid; (2.) and, thereupon
 "to have, ask, demand, and take her dower
 "by writ of dower or otherwise, according
 "to the common law, of and in all such
 "lands, tenements, and hereditaments as her
 "husband was, and stood seised of any
 "state of inheritance at any time during the
 "coverture, any thing contained in this act
 "to the contrary thereof notwithstanding.

10. " Provided also, That this present
 "act, or any thing herein contained, extend,
 "nor be at any time hereafter interpreted,
 "expounded, or taken, to extinct, release,
 "discharge, or suspend any statute, recog-
 "nizance, or other bond by the execution of
 "any estate of or in any lands, tenements, or
 "hereditaments, by the authority of this act,
 "to any person or persons, or bodies politic;
 "any thing contained in this act to the con-
 "trary thereof notwithstanding.

11. "And forasmuch as great ambiguities SECT. XI.
 "and doubts may arise of the validity, and The statute 25
 "invalidity of wills heretofore made of Hen. 8. c. 10.
 "any lands, tenements, and hereditaments,
 "to the great trouble of the king's subjects:
 "(2.) The king's most royal majesty, mind-
 "ing the tranquillity and rest of his loving
 "subjects, of his most excellent and accus-
 "tomed goodness, is pleased and contented
 "that it be enacted by the authority of this
 "present Parliament, that all manner true
 "and just wills and testaments heretofore
 "made by any person or persons deceased,
 "or that shall decease before the first day of
 "May that shall be in the year of our Lord
 "God 1536, of any lands, tenements, or
 "other hereditaments, shall be taken and
 "accepted good and effectual in the law,
 "after such fashion, manner, and form as
 "they were commonly taken and used at any
 "time within forty years next afore the
 "making of this act; any thing contained
 "in this act, or in the preamble thereof, or
 "any opinion of the common law to the con-
 "trary thereof, notwithstanding.

12. "Provided always, That the king's
 "highness shall not have, demand, or take
 "any advantage or profit for or by occasion
 "of the executing of any estate, only by
 "authority of this act, to any person or per-
 "sons, or bodies politic, which now have,

Sect. XI. " or on this side of the first day of May
The statute 27 Hen. 8. c. 10. " which will be on the year of our Lord
 " God 1536, shall have any use or uses,
 " trusts or confidences in any manors, lands,
 " tenements, or hereditaments holden of the
 " king's highness, by reason of premier seisin,
 " livery, ouster le main, fine for alienation, re-
 " lief, or harriot; (2.) but that fines for alien-
 " ations, reliefs and harriots, shall be paid to
 " the king's highness, and also liveries and
 " ouster les mains shall be used for uses, trusts,
 " and confidences to be made and executed in
 " possession by authority of this act, after
 " and from the said first day of May, of
 " lands and tenements, and other heredi-
 " taments holden of the king in such-like
 " manner and form, to all intents, construc-
 " tions, and purposes, as hath heretofore
 " been used or accustomed by the order of
 " the laws of this realm.

19. " Provided also, That no other per-
 " son or persons, or bodies politic, of whom
 " any lands, tenements, or hereditaments be,
 " or hereafter shall be holden mediate or im-
 " mediate, shall in any wise demand or take
 " any fine, relief, or harriot, for or by oc-
 " casion of the executing of any estate by
 " the authority of this act, to any person or
 " persons, or bodies politic, before the said
 " first day of May which will be in the
 " year 1536.

14. " And be it enacted by the authority SACT. XL.
" aforesaid, That all and singular person and The statute 27
" persons, and bodies politic, which at any Hen. 8. c. 10.
" time on this side the said first day of May
" which shall be in the year of our Lord God
" 1536, shall have any estate unto them ex-
" ecuted, of and in any lands, tenements,
" or hereditaments by the authority of this
" act, shall and may have and take the same
" or like advantage, benefit, voucher, aid
" prayer, remedy, commodity, and profit by
" action, entry, condition, or otherwise, to
" all intents, constructions, and purposes, as
" the person or persons seised to their use
" of or in any such lands, tenements, or he-
" reditaments, so executed, had, should,
" might, or ought to have had at the time
" of the execution of the estate thereof, by
" the authority of this act, against any other
" person or persons, of or for any waste,
" disseisin, trespass, condition broken, or
" any other offence, cause, or thing con-
" cerning or touching the said lands or te-
" nements so executed by authority of this
" act.

15. " Provided also, and be it further
" enacted by the authority aforesaid, That
" actions now depending against any person
" or persons seised of or in any lands, tene-
" ments, or hereditaments, to any use, trust, or
" confidence, shall not abate, ne be discharg-

SACT. XI. " ed for or by reason of executing of any
 The statute 27 " estate thereof, by authority of this act;
 Hen. 8. c. 10. " before the said first day of May which
 " shall be in the year of our Lord God 1536,
 " any thing contained in this act to the con-
 trary notwithstanding.

16. " Provided also, That this act, nor
 " any thing therein contained, shall not be
 " prejudicial to the king's highness for ward-
 " ships of heirs now being within age, nor
 " for liveries, or for ouster-le mains, to be
 " sued by any person or persons, now being
 " within age, or of full age, of any lands or
 " tenements unto the same heir or heirs now
 " already descended; any thing in this act
 " contained to the contrary notwithstand-
 " ing.

17. " Provided also, and be it enacted
 " by the authority aforesaid, That all and
 " singular recognizances heretofore know-
 " ledged, taken, or made to the king's use,
 " for or concerning any recoveries of any
 " lands, tenements, or hereditaments hereto-
 " fore sued or had, by writ or writs of entry,
 " upon disseisin in le post, shall from hence-
 " forth be utterly void and of none effect, to
 " all intents, constructions, and purposes.

18. " Provided also, That this act, nor
 " any thing therein contained, be in any wise

SECT. XL.

The statute 27
Hen. 8. c. 10.

“prejudicial or hurtful to any person or per-
“sons born in Wales, or the marches of the
“same, which shall have any estate to them
“executed by authority of this act, in any
“lands, tenements, or other hereditaments
“within this realm, whereof any other per-
“son or persons now stand or be seised to the
“use of any such person or persons born in
“Wales or the marches of the same, but
“that the same person or persons born in
“Wales, or the marches of the same, shall,
“or may lawfully have, retain, and keep the
“same lands, tenements, or other heredita-
“ments, whereof estate shall be so unto
“them executed by the authority of this act,
“according to the tenour of the same; any
“thing in this act contained, or any other
“act or provision heretofore had or made, to
“the contrary notwithstanding.”

(88.)

CHAP. II.

Of Uses since the Statute 27 Hen. 8. c. 10.

SECT. I.

The statute did
not abolish uses
altogether.

WHATEVER might have been the intention of the legislature, the statute of 27 Hen. 8. c. 10. certainly did not abolish the practice of conveying to uses: it has merely destroyed the intervening estate of the feoffees, or grantees; and thereby converted the equitable, into a legal, estate.

(89.)

Some have thought^a, that the legislature meant, that lands should not pass subsequently to the statute by way of use, but only by solemn livery; and therefore they held, that these words of the statute, "Where
"any person or persons stand, or be seised, or
"at any time hereafter shall happen to be
"seised," are not evidence that the makers of the act expected, that uses would be continued afterwards; but that those words were inserted to provide for a case, which possibly might occur: as, supposing a feoffee to uses had been disseised before the act, and the disseisin had continued until the act passed; at the time of

^a 1 Co. 125. a, b.

the act, he was not seised to the use of any person; but he might afterwards, by his entry, re-vest the uses, and then, being seised to the uses after the act, the use would have been executed in the cestuique use. But this appears to me to be a refined construction upon the words of the statute. Can it be supposed, that the framers of an act, which, as sir Francis Bacon has observed^a, contains the wisest and fittest ordinances, and the most foreseeing and circumspect savings and provisoes, could not foretell, that there might have been future conveyances to uses? Were they unacquainted with the doctrine of resulting uses? And if they had intended; that lands should not pass by future conveyances, operating by way of use, and that resulting uses should not be executed by the statute, can it be supposed, that they would not have expressed themselves clearly upon those points? To me it appears evident, that, although the statute, by incorporating the use and possession, has virtually extinguished the separate existence of the use, it was not in the contemplation of the legislature to prevent conveyances to uses. This opinion is supported by the statute of intolments, which makes an additional ceremony necessary to the transfer of the use, and by the twelfth section of the statute of uses, which speaks of uses to be made and exe-

Sect. 1.

The statute did
not abolish uses
altogether.

(90.)

^a *Bac. Uses, 30.*

SECT. I.

The statute did
not abolish uses
altogether.

cuted in possession, after a particular period; and it is sanctioned by sir Francis Bacon^c, who, with respect to the case of the disseisin before the statute, observes, that the regress of the feoffees, after the statute, was excluded by the two savings; for the first saving respects the right of all persons, except the feoffees; and the second saves the right of the feoffees to their own use; so that between both, the right of the feoffees to the use of another, was shut out^d.

SECT. II.

Of the circumstances necessary to the execution of uses.

II. There are several circumstances necessary to the raising and execution of uses by virtue of the statute.

(1.) As to the person seised to the use.

Persons seised
to the use.

The statute 27 Hen. 8. did not, nor indeed could, alter the nature of the use^e. It would be a contradiction in terms to say, that an equitable interest, not within the statute 1 Rich. 3d, was a use within the statute 27 Hen. 8.: and it must therefore follow, that a person not capable before the statute 27 Hen. 8. of being seised to a use, cannot be a grantee to uses after it. I have already mentioned the several persons incapacitated to stand seised to

^c Bac. Uses, 40.

^d Ibid. 51.

^e "The statute 27 Hen. 8. doth only execute old

"uses, but doth not create any new uses." Per Coke, in Cowper v. Frankline, 3 Bul. 185.

uses^f; and it is only necessary to remark in this place, that if an alien be enfeoffed to uses, the statute executes the use until office found: but upon office being found, the use is destroyed by relation^g. It is the same, if a person, having committed treason, is made grantee to uses, and is afterwards attainted^h.

SECT. II.

Of the circumstances necessary to the execution of uses.

But the statute 27 Henry 8. executes trusts and confidences, as well as uses; and it appears obvious to me, that under these words, the legislature intended, that every beneficial interest, in the shape of a trust, for the performance of which the subpœna would lie against the trustee, and where the old use, or legal estate was not, either by express declaration or necessary construction, vested in him, should be executed by the statute, notwithstanding the trustee, on account of his limited or inferior estate, or by reason of tenure, could not stand seised to a use before the statute. By attending to this distinction, I apprehend, that the apparent contradictions in the books, upon the subject under consideration, may be reconciled.

I have already stated the grounds, which have occurred to me in support of the con-

^f Ante 62.

^g Bac. 59. King v. Boys, Dyer, 283. b. pl. 31.

^h Bac. 58, 59. Throgmorton's case, cited Moor, 390, 391.

SECT. II.
Of the circumstances necessary to the execution of uses.

clusion, that neither tenant for life, nor for years, could stand seised to a use before the statuteⁱ; but it is clear, that the statute executes the trust declared upon the seisin of a grantee for life^k: and so it would have executed the trust declared upon a term for years, if the statute had used the word, "*possessed*," as well as "*seised*;" for the reason assigned by the books, that the trust is not executed in the latter case, is, that the word "*possessed*," is omitted in the statute^l, and not because a termor for years could not stand seised to a use.

To pursue this distinction: if the statute, in describing the persons standing seised to a use, had used the words, "body politic^m," I apprehend, that there would have been no ground to contend, that the trust declared upon the estate of a corporation, would not have been executed by the statute; for the reason, that a corporation could not stand seised to a use was, that the subpoena did not issue against it to compel the performance of the trustⁿ; a reason which has ceased to operate^o.

ⁱ Vide ante 40, & seq.

^k Shep. T. 507. 2 Leon. 16. Vaugh. 49. Crawley's case, Cro. Eliz. 721. Dy. 186. a. See Williams v. Jekyll, 2 Ves. 682.

^l See Jenk. 195.

^m See Bac. 57.

ⁿ See Jenk. 195.

^o 2 Vern. 412. 1 Ves. 467. 468.

The same construction, I conceive, will apply to a trust declared upon the estate of a tenant in tail; for although Coke, Bulstrode, and others report^p, that in the case of *Cooper v. Franklyn*, it was determined, that he could not stand seised to a use, either by express declaration, or by implication: yet, admitting this construction in the fullest extent, the question will still be, whether the words of the statute do not include trusts declared upon, or limited to arise out of, the seisin of a tenant in tail? The statute mentions the word "*trust*," as well as "*use*;" and there is no doubt, that the word "*seised*," will extend to, and comprise, every freehold seisin; and there is nothing in the statute, which saves the right of a tenant in tail.

SECT. II.

Of the circumstances necessary to the execution of uses.

(92.)

(93.)

The case of *Cooper v. Franklyn* is in fact rightly determined. The use in that case could not have been executed by the statute; and therefore it became necessary to ascertain, whether tenant in tail could, before the statute, stand seised to a use. It was thus: John Walter enfeoffed Thomas, his son, to hold to him and the heirs of his body, to the use of him and his heirs for ever. Now, the use being limited to the feoffee himself, the sta-

^p Co. Litt. 19. b. 2 Co. Shep. T. 500. Jenk. 195. 78. a. 3 Buls. 184. Cro. Jac. Vide *contra*, Godb. 269. 403. Moor, 848. 1 Roll. Bacon, 57, 58. Dyer, 311. Rep. 384. 2 Roll. Ab. 780. b.

SECT. II. Of the circumstances necessary to the execution of uses. tute could not execute it; as the statute executes the use in those cases, where it is limited to third persons, as I shall show in the next section. The question, therefore, whether a trust declared upon a seisin conveyed to a person in tail, in trust for *another* person, and his heirs, be not executed by the statute, did not arise in, and certainly was not determined by, the case of *Cooper v. Franklyn*^a.

A cestuique use in case.

(2.) As to cestuique use.

I must observe, that all persons, who were capable of receiving or enforcing the use before the statute, can now take under the limitation of a use^r; and the statute on the part of cestuique use particularly couples the words *body politic* with that of person.

(97.) The statute says, "That where any person
"or persons stand or be seised, &c. to the use,
"confidence, or trust of any *other* person or
"persons, &c.:" and therefore if a use be limited to a feoffee, conuzee, recoveror, or releasee, such use, generally speaking, is not executed by the statute, but the feoffee, &c. is in by the common law^a. In this case, notwithstanding the grantee is in by the *common law*, yet after

^a In *Brent's case*, 2 Leon. 16. Manwood observes, that, "*at this day*, a gift "*in tail* or a lease for *life*, "*is made to another's use*; "*yet, notwithstanding that* "*the law doth create a te-*

"nure upon the lease or
"gift, yet the use expressed shall be good."

^r See ante, Ch. 1. S. XI. (2.)

^a *Samme's case*, 13 Co. 56. *Altham v. Anglesey*,

the declaration of the use to him, he has not only a seisin, but a *use*; although not the use, which the statute requires; and therefore that seisin, which, before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited on it; upon the principle, that a use cannot be limited upon a use. In *Tippins v. Cosins* (Comb. 313.), Hale observes, "Whether feoffees take by the common law, or by the statute, yet where the use is once disposed of to them and their heirs (whether the statute executes it or not), there cannot be a use upon an use, nor a trust upon such an use to be executed by the statute."

SECT. II.

Of the circumstances necessary to the execution of uses.

Gilb. Rep. 16, 17. Long v. Buckeridge, 1 Stra. 106. Ba. Uses, 43. 62. Gwam v. Roe, 1 Salk. 90.

"Possession is transferred to the use by the statute; and therefore an use cannot be expressed upon a use, as feoffment to J. S. to his own use, and that he shall be seised to the use of R. H.; this is void to R. H. because the use and possession were to J. S. before." Moor, 46. pl. 138.

"A. enfeoffed B. and C. (his two sons) to the use of himself for life, and after to the use of them and their heirs, *ad ultimam voluntatem suam perimplendam*, and afterwards de-

"vised it to D. *Per Gawdy*, "D. shall not have the land, for a use cannot be limited to a use. So that when he limits it to the use of his two sons and their heirs, he cannot afterwards limit it to the use of his last will; but the words *ad ultimam*, &c. are void words, as to the limiting any uses thereby. And to that opinion *Clench, J.* agreed; but *Fenner, J.* doubted. *Girland v. Sharp, Cro. Eliz.* 382. pl. 2."

"If one without any consideration enfeoff another by deed, habend. to the feoffee and his heirs, to his own use, and the

SECT. II.

Of the circumstances necessary to the creation of uses.

The ground of this construction is, that before the statute, real property was divided into use and possession; but there was no third kind of interest then known. Consequently, when the seisin was transferred to A. B. and his heirs, and it was added, to *the use* of him, and *his heirs*, he had both the legal and beneficial interest; and there is nothing in the statute to alter the nature of his estate.

(98.)

In a case¹, where M. gave his land to E. R. and his wife, *habendum* to the said *baron and feme*, to the *use* of them, and *the heirs of their two bodies*, and for want of such issue, remainder to E. M. and his heirs; the question was, whether the baron and feme had an estate tail, or an estate for their lives only? It was argued, that the estate, out of which the use should arise, was an estate for their lives, and the use could not make the estate larger than the limitation of the seisin: but the judges conceived, that there was a difference, where an estate was limited to one, and the use to a stranger, for, there the use should not be more than the estate, out of which it was derived; but not when the limitation was to two, ha-

"feoffee, suffer the feoffor
"to, occupy the lands ser-
"veral years; yet the right
"is in the feoffee; because
"express use is contained
"in the deed." And. 37.

pl. 95. Anon. See post.
157.

"Jenkins, v. Young, Gro.
Car. 230, 244. See Young
v. Dymock, Dy. 186. s. in
notis.

bandum to them, to the use of the heirs of their bodies; for this was *no limitation of the use*, nor was it executed by the statute; but it was a limitation of the *estate* to them and the heirs of their bodies *by the course of the common law*.

SECT. II.

Of the circumstances necessary to the execution of uses.
(99.)

So if an estate be conveyed to A. B. and C. and their heirs, "To hold unto the said A. B. and C. their heirs and assigns, to the use of the said A. B. and C. for and during the natural lives of them, and the life and lives of the survivor and survivors of them;" it should seem, that this is not a statute-use; but that A. B. and C. will take an estate of freehold for their lives by the common law*.

Sir Francis Bacon* observes, "that the statute ought to be expounded; that where the party seised to the use and the cestuique use is one person, he never taketh by the statute, except there be a direct impossibility or impotency for the use to take effect by the common law." When a grantee to uses takes a partial or limited estate under the limitation, and the remaining portion of the use is declared to a third person, the grantee may, in some cases, acquire a legal estate by

* Bac. Uses, 63. See Collection, of Cases and an excellent opinion upon Opinions, vol. 2. 281.
this case by the late Mr. * Bac. Uses, 63.
Booth, published in the

Sect. II.
Of the circumstances necessary to the execution of uses.

the statute; and I apprehend, that the ground of this construction is, that the words of the statute being satisfied by the limitation of part of the use to a third person, courts of law will give effect to the whole limitation in such a way, as to make it conformable either to established rules of law, or to the intention of the parties.

- (100.) *First*, where the use is limited to the feoffee *in tail* out of his own seisin in fee, and the remainder over to another: as if a feoffment be made to J. S. in fee, to the use of himself in tail, with remainder to D. in fee; or if J. S. covenant to stand seised to the use of himself in tail, with remainder to the use of his wife in fee; in both these cases the estates tail limited to J. S. are executed by the statute². But I apprehend, that the construction would have been different in the case of the feoffment, if the whole seisin had not been limited to the feoffee; thus, if the feoffment had been made to J. S. *generally, habendum* to and to the use of *himself in tail*, with remainder to the use of A. B. in fee. Now in this case, J. S. has not a seisin to serve the use to A. B.; and therefore, if the remainder to him can take effect at all, it must take effect by the livery made to J. S. in the course of possession by the common law³. So too the con-

² Bac. Uses, 63. 13 Co. Litt. sec. 60. If a feoffment had been made to A.

³ See 2 Roll. Ab. 68. for years, remainder to B.

struction is different, if the use upon the feoffment be in the first instance limited to the feoffor or a stranger for life, or in tail, with the remainder to the feoffee in fee^a: and it should also seem, that if the first use be limited to the feoffee *for life*, or *for years*, with the remainder over in fee, he will take by the common law^a.

SECT. II.

Of the circumstances necessary to the execution of uses.
(101.)

Secondly. Where the whole seisin in fee is conveyed to the feoffee, and many estates in the use are carved out of such seisin, one of which estates the feoffee takes; as if A. be enfeoffed to the use of C. D. for life, remainder to the use of himself for life, remainder to the use of J. N. in fee; the use limited to the feoffee will be executed by the statute; for the law will not admit fractions of estates^b.

Thirdly. If J. S. be enfeoffed to the use of himself and a stranger; or if a feoffment be made to a bishop *and his heirs*, to the use of himself and *his successors*; the use is executed by the statute in both cases^c.

(102.)

in fee, and the livery had been made to A. this would have passed the fee to B. in course of possession at common law.

^a Co. Litt. 22. b. Bac. Uses, 64.

^a Bac. Uses, 63. and see Booth's Op. cited ante.

^b Ibid. 64.

^c Bac. Uses, 64.

SECT. II.

Of the circumstances necessary to the creation of uses.

Here I cannot with propriety omit the advice of lord Bacon^d. "Now let me advise you of this, that it is not a matter of subtilty or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of possession; but it is material for the deciding of many causes and questions, as for warranties, actions, conditions, waivers, suspicions, and divers other provisos."

A use in esse.

(3.) The statute requires, that there should be a use *in esse* in possession, reversion or remainder. That use may be either expressed or implied.

Of express uses, and by what words created.

(103.)

First; *Of express uses*. The statute mentions the words *use, trust, and confidence*. If lands be conveyed to A. and his heirs in trust for B. and his heirs, or in confidence, that he and they shall take the profits, the legal estate is vested in B. by virtue of the statute^e: and it is to be observed, that upon the execution of every use or trust by the statute, cestuique use shall have the legal estate, *after such quality, manner, form, and condition, as he*

^d Bacon's Uses, 65.

Bangley, 21 Salk. 679.

^e Eure v. Howard; Prec. Ch. 345. Broughton v.

Right ex dem. Phillips v. Smith, 12 East, 455.

had before in or to the use, confidence, or trust, that was in him^f.

SECT. II.

Of the circumstances necessary to the execution of uses.

Besides the words mentioned by the statute, the word *intent* will raise a use^g. Thus a man made a feoffment in fee, *sub conditione, ea intentione*, that his wife should have the land for her life, with remainder to his younger son in fee; the feoffor died, and also the feoffee, without having made any estate. The heir of the feoffor entered as for a condition broken; but it was resolved, that this was no condition, but an estate executed presently by the statute, according to the *intent* of the parties^h. So if it appears, that the parties intended to create a use, though that intention be not expressed by the word *intent*, or by any other of an express fiduciary import, yet the use will be executed by the statute. Therefore in a caseⁱ, where A. in 4th Hen. 7. made a feoffment in fee, and accompanied it with a deed of defeazance or declaration, which gave the feoffor and his heirs a power of entry after quiet enjoyment by the feoffees for 100 years; it was held by the judges, after the term had elapsed, that the lands were vested in the heir of the feoffor by the statute 27 Hen. 8. ;

(104.)

^f See upon these words, *Bur. Uses*, 47.

^g *Mummeuston's case*, *Dyer*, 166. a. in *notia*. *Benson v. Bateson*, *ibid.* and

⁴ *Leon.* 22. ⁵ *Vin.* 44. pl. 5. and notes.

^h *Anon.* 4 *Leon.* 2. pl. 3.

ⁱ *Boydell v. Walthell*, *Moore*, 722.

SECT. II. for that it appeared to be the *intent* of the feoffor, that he should have the lands after the 100 years possession by the feoffees. This *intent* was the *use* of the feoffment, which arose out of the possession of the feoffees, and was executed by the statute of uses ^d.

Of the circumstances necessary to the execution of uses.

(105.) It has been said, that if A. (the grantor) be entitled to a remedy at common law by an action of covenant in order to compel B. (the grantee) to execute estates, there, as no subpœna will lie for A. as *cestuique use* against B.; so no use can be executed in A. by the statute ^e.

Of implied or resulting uses.

Secondly; *Of implied or resulting uses.* As the statute did not expressly abolish all future limitations of, and estates created by, uses, there was actually no avoiding the execution of uses, limited or occasioned by conveyances made subsequently to the act. When a feoffment was made without consideration and declaration of the use, what construction was to be adopted? We have seen, that, before the act, the chancery, which judged according to the intention of the parties, would have construed the *possession* to be in the feoffee, and the *use* in the feoffor.

^d See Callard v. Callard, 10 Cro. Eliz. 344. 2 Roll. Ab. 788. Moore, 687. ^e See Wingfield v. Lit-

leton, Dyer, 162. a. See post, 6th subdiv. of this Sec. p. 121.

Does the statute destroy this construction? SECT. II.

On the contrary, the case appears to come directly within the meaning of it; the words being, *that where any person, &c. stands seised to the use of another, by reason of any feoffment, &c. or by any manner of means whatsoever*, then, &c. In this case, the feoffee stands seised to the use of another, viz. the feoffor, by an admitted construction before the act. The act certainly did not intend to alter the manner of raising uses; nor did it mean to make any thing pass by a conveyance, which did not pass before; that is to say, it did not mean, that the *land* and *use* should now pass in a case, in which the *land* only passed before the statute^f. It may therefore be considered as a general rule, that if a feoffment be made, a fine levied, or recovery suffered without consideration and declaration of the use, the use will result to the feoffor, &c. and be executed in him by the statute^g.

Of the circumstances necessary to the execution of uses.

(106.)

Indeed it is said^h, that if a feoffment be pleaded, the use need not be averred to the feoffee; because if nothing appear to the

(107.)

^f Vide 2 Raym. 800. Co. Litt. 22. b. Jenk. Cent. 253.

^g *Armstrong v. Wolsey*, 2 Wils. 19 Doug. 26. *Beckwith's case*, 2 Co. 56. 58. b. *Dyer*, 146. b. 2

Roll. Ab. 781. *Read v. Errington*, Cro. Eliz. 321. 22 Vin. 214. pl. 1. and notes.

^h *Shortridge v. Lamplugh*, 2 Salk. 678. 7 Mbd. 71. 1 Stra. 107.

SECT. II.
Of the circum-
stances neces-
sary to the crea-
tion of uses.

contrary, the use must be intended to be in him; and that such was the form of pleading *before* the statute. If this be the course of pleading, it may be asked, what utility can arise from the doctrine of resulting uses? To which it may be answered, that although the rules of pleading do not require an averment of the use in favour of the feoffee, yet it may be averred to be in the feoffor; and that the want of a consideration and declaration of the use is a sufficient circumstance to prove, that it was intended for him¹.

I must here observe, that uses generally result according to the estate and interest of the person or persons making the conveyance^k; and he or they, in that case, claim

¹ *Anglesea v. Altham*, Helt Rep. 787. 1 Stra. 107. In the margin of Salkeld's Reports, which belonged to the late Serjeant Hill, opposite to the case of *Shortridge v. Lamplugh*, is the following MS. note, which, although not in the hand-writing of, is evidently dictated by, the learned Serjeant.

"*Contra Vin. Uses* (Y. a.) pl. 1. and the notes, pl. 24.; but most of the cases there cited before the statute; and, therefore, Q. if since the statute it is not necessary, in pleading a feoffment or release, for the feoffor

"or releasor to make an averment, that it was to his use: and it seems, that the want of a consideration would be evidence of the truth of such averment, if traversed; but if the deed purports a valuable consideration, the feoffor or releasor cannot be admitted to take such averment. Dyer, 169. pl. 21. S. P. 9. Co. 11. b. accordingly as to a recovery, and Salk. 676. pl. 2: as to a fine and feoffment."

^k See ante CH. I. S. ix. (3.) *Roe v. Popham*. Doug. 24. and 22 Vin. 218. pl. 2. and notes, and pl. 6. 7.

under the old use. However, when a tenant in tail suffers a recovery without consideration or declaration of the use, the use (notwithstanding the aspect of some of the cases¹) will result to the *recoveree* in *fee*^m; for as the recoveror or demandant acquires a seisin in fee, the use, if it result at all, must result according to the extent of that seisin; the words of the act being, that the *estate, title, right, and possession* of the person seised to the *use* shall be transferred to the *cestuique use*; and in the very distinguished argument of the chief justice *Lee*, in delivering the opinion of the court in the case of *Martin v. Strachan*ⁿ, is the following passage: "It is the use of the *fee simple* that "passes to the recoveror from *tenant in tail*, "and which results to *him* (i. e. tenant in tail) "and *his heirs*, if no use is declared °."

SECT. II.

Of the circumstances necessary to the execution of uses.

(108.)

The preceding observations are made upon the case of a feoffment or other conveyance without consideration, and without the declaration of *any part of the use*. The law equally favours a resulting use upon a conveyance, where only part of it is limited, and the remainder left undisposed of; it being a

(109.)

¹ See *Argol v. Cheney*, Latch. 82. *Waker v. Snow*, Palm. 359.

^m 9 Co. 8. b. *Gilb. Uses*, 61. *Nightingale v. Ferrers*, 3 P. W. 206.

ⁿ 5 Term Rep. 107. 110. in note.

^o See post, as to the effect of a declaration, or the want of one, in breaking the descent, Sec. 7.

SECT. II. rule, that so much of the use, as the grantor does not dispose of, remains in him ^p. Thus, if a feoffment in fee be made to the use of the heirs of the body of the feoffor, the use is undisposed of during his life; it will therefore result, and then he will have an estate tail executed in him ^q. So if the use upon a feoffment in fee be declared to the feoffee for life, and no further declaration be made, the remainder of it will result to the feoffor ^r: or if the use in the first instance be limited to the feoffor in tail without any further declaration, the use in reversion will result to him ^s; but not so, if the use be limited to the feoffor for *life* or for *years*; because if it did, the feoffor could not have an estate for life or years, as he intended ^t.

(110.) It is the intention of the parties, to be collected from the face of the deed, that gives effect to resulting uses. Therefore, it has been said, that the payment of 5s. or the like, serves as an implied declaration of the use to the feoffee, when it is not otherwise

^p Co. Litt. 23. a. Woodriff v. Drury, Cro. Eliz. 439. Audley's case, Dy. 166. a.

^q 1 Mod. 161, 162. 1 Roll. Rep. 240. 22 Vin. 283. pl. 2. and the cases collected in the note. Ibid. 200. and cases in note to pl. 7. Post, 141.

^r See next page and 1 Ves. 483.

^s Vide Dy. 111. b. in notis.

^t Ibid. Adams v. Savage, 2 Salk. 679. Rawley v. Holland, 22 Vin. 189. pl. 11.

expressly disposed of. On the contrary, the want, both of consideration and declaration shews, that the feoffor never intended to part with the use. This has been the construction, when no part of the use has been expressly limited. But the same rule does not hold, as I have already stated, where any part of the use is limited from the feoffor, &c. and the residue left undisposed of: for the express declaration in this case is presumptive proof, that he did not mean, that the grantee should have the remainder of the use. Therefore if an estate be granted even for a *valuable* consideration to feoffees and *their heirs*, to the use of them for their *lives*, it should seem, that the remainder of the use will result to the grantor^u: for the extent of the express limitation is the measure of the consideration.

- Sect. II.

Of the circumstances necessary to the execution of uses.

In the case of a springing use, arising from a seisin in fee simple, where there is no express limitation of the use, until the event happens upon which the springing use is to arise, the use will result to the grantor in fee simple. Thus if A. enfeoff B. and his heirs, to the uses following, that is to say, after marriage had between A. and Anne, his

^u See *Wilkes v. Luson*, 125.—Booth's opinion cited Dy. 169, *Wilkins v. Parrat*, *sup.* See more of resulting uses post, sec. 5th; subdivisions 2d and 5th.

SECT. II. intended wife, to the use of A. and Anne, and the heirs of A.; the use, until the marriage, will result to A. in fee^v.
Of the circumstances necessary to the execution of uses.

(111.) The statute of frauds, 29 Car. 2. c. 23. by an express saving, does not extend to trusts and confidences, that arise or result by implication of law. It has however been said, that as a use now becomes a *legal* estate by the operation of the act, that clause is not applicable to it^w.

It has been determined, that a resulting use may be rebutted by parol evidence^x. But neither the grantor nor grantee can aver a use to a third person since the statute^y.

An hereditament.

(112.) (4.) By the words of the statute every species of real property (except copyhold estates^z), whether corporeal or incorporeal, in possession, reversion, or remainder, may be conveyed to uses. The property, however, must be *in esse* at the time of the creation of the use. Therefore if A. covenant to stand seised of lands, which he shall afterwards purchase, to certain uses; no use can arise by virtue of such covenant upon lands, of which

^v 22 Vin. 220. pl. 1. (P.)

^w Lamplugh v. Lamplugh,
1 P. W. 112.

^x Roe v. Popham, Doug.
26.

^y 2 Salk. 676.

^z See post, sec. 3.

he may afterwards become the purchaser^a. So if A. convey his lands by bargain and sale to J. S. in fee, with a way over other lands; the right of way does not pass^b: because by the operation of the *bargain and sale* the use is first vested in the bargainee; and consequently there is no previously existing seisin of the right of way, out of which the use can arise. But the grant of a rent-charge *de novo* to uses is within the statute^c: because the land is the seisin out of which it arises.

SECT. II.

Of the circumstances necessary to the execution of uses.

(5.) In order that a use may be executed by the statute, there must be a seisin in the feoffee or grantee at the time of its execution: for, as lord Bacon has observed^d, “the matter and substance of the estate of *cestuique* use is the estate of the feoffee, and more he cannot have.” When a feoffment is made to A. and his heirs, to the use of B. and his heirs, or to the use of B. for life, with remainder to the use of C. in fee; here the seisin of A. is entire, and upon the execution of the conveyance, it is immediately transferred from him according to the limitation of the use. Vested remainders or reversions may be

There must be a seisin in the feoffee or grantee.

(113.)

^a *Yelverton v. Yelverton*, Cro. Eliz. 401. Moor, 342. 2 Roll. Ab. 970. 22 Vin. 27. pl. 7, 8, 9. A feoffment in fee upon condition that if feoffor do such a thing, he shall re-enter and retain

the land to the use of a stranger, the use is void. 1 Leon. 269. pl. 362.

^b *Beaudley v. Brook*, Cro. Jac. 189.

^c Bac. Uses, 43.

^d *Ibid.* 47.

SACT. II. legally granted; and consequently uses may be limited upon the seisin so transferred in remainder or reversion: but consistently with the rule just noticed, as contingent remainders, or rents already granted to take effect upon a contingency, cannot be transferred at law during the suspense of the contingency, it follows, that no use can be limited upon the transfer of such contingent remainder or rent. The statute transfers the legal possession or estate to the use; but a seisin, not legally vested, cannot serve a use.

Of the circumstances necessary to the execution of uses.

It sometimes occurs in practice, that a conveyance is made to A. B. and C. D. and the survivor of them, and the heirs of such survivor, to uses limiting the estate in strict settlement. In this case, the remainder to the survivor of A. B. and C. D. is a contingent remainder; and until the death of one of them, there is no actual vested seisin to serve the uses.

The seisin transferred by feoffment, fine, recovery, and lease and release, for the purpose of serving uses, may be called an actual seisin: but by the operation of the statute there may be a possibility of seisin, or *seisin à jure*.

Of an actual seisin co-extensive with the estate.

First. *Of the actual or present seisin.* It may be considered as a general rule, that the seisin of the feoffee, releasee, &c. must be

commensurate to the use declared upon it; or in other words, cestuique use cannot have an estate in the use more extensive than the seisin, out of which it is raised. Thus if land be conveyed to A. for life, to the use of B. for life, in tail, or in fee, the estate of B. must determine upon the death of A.^a

Sect. II.

Of the circumstances necessary to the execution of uses.

If a seisin in fee be properly created, that seisin will serve uses declared upon it, although the person, who created it, had not an estate in fee-simple in the lands conveyed. Thus, when a tenant in tail suffers a recovery, the use may be declared in fee^f: and if a tenant for life or years make a feoffment in fee, and the use be declared in fee, such use will be executed according to the extent of the tortious seisin acquired by the feoffment^e.

(114.)

Secondly. *Of the possibility of seisin.* The *scintilla juris*, or possibility of seisin, is supposed to exist in *feoffees, releasees, &c.* to uses, when all actual seisin is taken from them by the operation of the statute, in two particular cases: first, upon the limitation of springing uses: 2dly, upon the creation of contingent uses. I shall in this place speak of springing and contingent uses, so far only

Of the possibility of seisin.

^a Dy. 186. a. Vaugh. 49.

Bac. Uses, 47. Cro. Car.

231. 3 Bulst. 184. See

Crawley's case, Cro. Eliz. 721.

^f See ante, 96, 97.^e Co. Litt. 10. a. 186. b.

188. a.

Sect. II. as they will explain the nature of the *scintilla*

Of the circumstances necessary to the execution of uses.

(115.)

First, if a feoffment or lease and release be made, a fine levied, or recovery suffered to A. and his heirs, to the use of B. and his heirs, until C. pay a sum of money, and then to the use of C. and his heirs; in this case the use is executed in B. and his heirs by the statute; and as this use is co-extensive with the seisin of A., there can be afterwards no *actual* seisin remaining in him: but when C. pays the money, the former use to B. ceases, and a new use springs up, and is executed in C. in fee. The question is, out of whose seisin is the secondary use to be served? It cannot be served out of the possession of B., because he is *cestuique use*; nor out of the original seisin of the feoffor, &c.; because the livery, &c. entirely divested him of all possession whatever^b. Neither could the use to C. be executed until payment of the money; because the *two* uses could not exist at the same time^c. To avoid these difficulties, it was said, that the use should arise out of the original seisin of A. the grantee; that although no actual seisin remained in him after the execution of the use to B., yet upon the ceasing of the use limited to B., the original seisin reverted to A. for the purpose of serving the secondary

^b Vide 1 Leon. 269.

^c Co. Litt. 271. b.

use to C.: and that before the money was paid, this possibility of reverter of the original seisin should be considered as a *possibility of seisin*, or *scintilla juris*.

SECT. II.

Of the circumstances necessary to the execution of uses.

Secondly. A feoffment is made to J. S. in fee, (116.) to the use of A. for life, remainder to the use of his first son unborn in tail, with remainder to the use of B. in fee. Does any and what seisin remain to J. S., until the birth of a son of A.? The solution of this question formed the great difficulty in Chudleigh's case^k. On the one hand it was said, that an actual estate in remainder vested in J. S. to serve the contingent use, when it came *in esse*; whilst others were of opinion, that no part of the original seisin remained in J. S., and that the contingent use, when it should arise, must be served 'out' of the former seisin of the grantee: that is to say, that as the whole seisin was taken out of J. S., so much of it as was necessary to serve the contingent use, when it came *in esse*, should remain in the preservation and custody of the law, and should not return to, or revest in, him. But both these opinions were considered erroneous: for with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate, until that

^k See the case post, s. 8. 1 Co. 120. a.

SECT. II. limited to the son should arise; besides, if J. S. had a vested estate in remainder, he might enter for a forfeiture, and punish waste, &c.; and it is clear, that the parties intended him no such benefit. With respect to the second notion; it was thought to be against the words and meaning of the statute, which requires the grantee to be seised *at the time of the execution of the use*. But the true construction appears to be, that J. S. has not an actual estate or seisin during the suspense of the contingency; nor is the whole seisin taken from him; but that the possession is executed according to the limitation of the uses; that as a new use will arise upon the birth of A.'s son, so as to precede the limitation to B., so upon that event a seisin, co-extensive with the estate in use limited to such son, will vest in J. S. for the purpose of serving it; and that until the contingency happens, J. S. has a mere possibility of seisin, which may never become actually vested in him.

(117.)

The doctrine of *scintilla juris*, or possibility of seisin, has been generally admitted since the decision in Chudleigh's case, in the reign of Elizabeth¹, until the late Mr. Fearn^m suggested some doubts as to the necessity and propriety of it in the case of contingent uses. The point has since become the sub-

¹ 1 Co, 120, a.

^m 1 Fearn, 486 to 446.

ject of earnest controversy^a: but the author of this work, following the received opinion^b, considers the doctrine established upon principle and authority; and consequently he thinks that this possibility of seisin may be released or destroyed, or by the failure of heirs of the grantee to uses become extinguished^c.

Sect. II.

Of the circumstances necessary to the execution of uses.

(6.) The words of the statute expressing the conveyance or deed, by which the use is created, are these, "bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatever^d." Notwithstanding the generality of the above words, in order to raise the use by the statute, there must be either a direct or actual conveyance, operating by way of transmutation of possession, or a contract or covenant, operating as a *bargain and sale*, or a *covenant to stand seized to uses*:

By what conveyance the use may be raised.

(118.)

^a Sugden on Powers, 17. Note to Gilb. Uses, 296. Rowe's Bacon, 151. and his Scintilla.

^b Probably no man more accurately understood the laws of uses, and the construction of the statute, than the late Mr. Booth; and he certainly considered the doctrine of *scintilla juris* established. See Opinion at the end of Shepherd's Touchstone. Indeed Lord Eldon, in *Maudrell v. Maudrell*, 10 Ves. 255,

seems to consider the doctrine as peculiarly Mr. Booth's: "the use would engraft itself upon what Mr. Booth calls *scintilla juris*, in the releasees."

^c See post, 147, 148. 187 to 195.

^d It seems, that there may be a surrender to a use. Cro. Eliz. 688. A use cannot be raised upon a release operating by way of *Mitter le droit*. 18 Co. 55. Note to pl. 1. 22 Vin. 209. (O. 3.)

SECT. II. for as to *contracts and agreements*, which are merely referrible to actual conveyances, they certainly do not raise uses under the statute". Thus^o, where T. S. by indenture, covenanted and granted, in consideration that A. B. had conveyed divers lands and tenements to him in fee-simple after the death of the said A. B., that the said T. S. would levy a fine to conu-zees of other lands; by which fine the said other lands should be assured to the said T. S. for life, remainder to the said A. B. in tail; and no fine was levied: it was determined, that the covenant to levy a fine did not of itself change or raise a use.

(119.) In another case^p, A. by indenture covenanted, that she would assure lands by recovery to B. (her son-in-law) to and for such uses, as should in a subsequent part of the said indenture be declared. B. covenanted, that within eight months after the assurance made, he would make an estate to A. for life, remainder to B. and C. his wife in tail, remainder over in fee. The recovery was suffered accordingly; but no further declaration of the uses was made in the said indenture; nor were the estates conveyed by B. pursuant to his covenant. It was held, that neither

^o See *Hore v. Dix*, 1 Sid. 25. *Petfield v. Pearce*, 2 Roll. Ab. 789.

^p *Bainton's case*, Dy. 96.

a. *Shep. Touch.* 82.

^p *Wingfield v. Littleton*, Dy. 162. a. See also *Audley's case*, *ibid.* 166. a.

the recovery, nor covenant by B. could change or declare the use, so as to execute it in A. for life, &c.; and that it could not result to A. in fee: because as she had her remedy against B. at common law by an action of covenant, no *subpœna* would lie to compel him to execute the estate.

SECT. II.

Of the circumstances necessary to the execution of uses.

By more modern resolutions, it has been determined, that articles entered into before marriage, to settle lands to certain uses, do not alone raise the uses; but that an actual conveyance is necessary¹. This principle was adopted in the case of *Trevor v. Trevor*². There A., in consideration of an intended marriage, covenanted with trustees before the end of two years to settle lands upon the said trustees, to the use of himself for life, without waste, remainder to the use of his intended wife for life, remainder to the use of the heirs male of him on her body to be begotten, and the heirs male of such heirs male lawfully issuing, remainder to his own right heirs: and A. covenanted, that in case the uses were not well raised according to the meaning of the articles, then he and his heirs would stand *seised* of the premises, until such time as a farther assurance should be made thereof, to the uses mentioned in the articles. No

(120.)

(121.)

¹ See *Edwards v. Freeman*, 2 P. W. 436. 439. 447. ² 1 P. W. 622. 1 Eq. Ab. 387.

SECT. II. settlement was made pursuant to the articles, and several years afterwards A. and his wife levied a fine of the same lands to other uses. The Lord Chancellor considered the whole of these articles, as in their nature *executory*: and, among other things, observed, that the covenant to stand seised in the latter end of them, could not be taken as a final settlement from the words of it; and that the precedent part of them was provisional only, viz. to stand seised till a settlement should be made.

Of the circumstances necessary to the execution of uses.

The preceding cases are upon covenants or contracts referring to a subsequent conveyance. The same rule seems to have prevailed, where the covenant is merely executory, and upon which an action of covenant appears to have been the proper remedy, in case the covenant was not performed. Thus, when a father covenanted with his eldest son, that certain lands should, after the death of the father, descend, remain, or be to the son and his heirs; no use arose upon this covenant, because, as the book states, it was executory, and for which an action of covenant would lie*. So where A., seised in fee, covenanted with B. in consideration of a marriage to be

* *Blitheman v. Blitheman*, 121. pl. 153. *Moor*, 122. *Cro. Eliz.* 279. See *Benl.* pl. 269.

had between J. S. and J. D., that certain lands should, after the death of A., remain unto the use of the said J. D. and J. S. and to the heirs of the said J. D.: the marriage took effect: but it was determined, that no use was raised by the covenant; it not being a covenant to stand seised, but merely that the lands should remain[†].

SECT. II.

Of the circumstances necessary to the constitution of uses.

To the preceding observations, it seems necessary to add the following case.—A. bargained and sold land to B. and his heirs for 500*l.*, upon condition, that if A. paid B. 500*l.* he might re-enter, and be seised to the use of himself and his heirs, until he attempted to alien without the assent of B., and then to the use of B. and his heirs; and a fine was levied to those uses. A. paid the 500*l.* and entered; and afterward aliened to J. S. without the assent of B.

Pet Ld. C. Egerton, no use will arise to B.; because A., entering for the condition broken, ought to be in of the old use and estate, and cannot be seised to the other use[‡].

[†] Buckler v. Symons, 2 Roll. Ab. 788, In Crossing v. Scudamore, 1 Vent. 141. it is said, that no use arose in the case in Moor, 122. pl. 269. for the uncertainty, how it was intended the

daughter should take. See the different cases upon this point collected in pl. 1. 23 Vith. 211.

[‡] Holloway v. Pollard, Moor, 761.

SECT. III.

As to the effect
of the union of
the use and pos-
session.

(122.)

III. Having considered the several circumstances necessary to the raising and execution of uses by the statute; I shall now state the effect of the transfer of the possession to the use by the statute, as between the grantee and the cestuique use.

In respect to
the feoffee, re-
leasee, &c.

The grantee
entitled to the
possession of
title-deeds.

(123.)

1st. *As to the estate of the grantee:* It is obvious, that as the statute has made the estate of cestuique use legal instead of equitable, and entirely divested the feoffees, releasees, &c. of all estate whatever, most of the incidents, which attended the use in its fiduciary state, are now at an end. With respect to the feoffee, he has no interest at all in the land; and therefore on his account, it cannot escheat, nor be forfeited; nor is it subject either to dower or courtesy on account of his momentary seisin^v. However, as the statute only transfers the legal estate to the use, it does not interfere with the title-deeds: and therefore it is a point, which appears to me to be clearly settled, that the feoffee or grantee to uses is entitled to the custody of them^x. Upon this account it has been repeatedly determined, that a *profert* is not ne-

^v See 2 Comm. 333. Sneyd v. Sneyd, 1 Atk. 443. Note, pl. 31. Dyer, 233. b.

^x Estofte v. Vaughan, Dyer, 277. a. Stockman

v. Hampton, Cro. Car. 441. Huntingdon v. Mildmay, Cro. Jac. 217. Reynell v. Long, Carth. 315. Whitfield v. Fausset, 1 Ves. 387. 394.

cessary in pleading a gift under the statute of uses⁷.

SECT. III.

As to the effect of the union of the use and possession.

2dly. *But as to the estate of cestuique use*, it is subject to escheat, to courtesy, dower, and all the incidents, to which a *legal* estate is liable⁸.

Rents conveyed or limited to uses are executed by the statute; and cestuique use is entitled to all remedies and rights relative thereto; but not to *collateral* rights⁹.

The 14th section of the statute of uses, which vests in cestuique use the same or the like advantage, benefit, voucher, &c., is expressly confined to estates made before the 1st of May 1536; and from this circumstance there is ground to suppose, that none of these benefits would have been carried to the cestuique use by the general words of the act. But it is clear, that cestuique use is entitled to all benefits and advantages inherent to the estate, and to covenants running with the land.

In Lincoln College's case, it is said, "that he who hath a reversion by a limitation of a use, although he be in the post, yet he

⁷ See cases *supra*, and 3 Term Rep. 156.

⁸ See 2 Comm. 333.

⁹ *Boscawen and Herle v. Cooke*, 1 Mod. 223. 2 Mod. 138. S. C.

SECT. III.

As to the effect
of the union of
the use and pos-
session.

"shall take benefit of a condition, as an assignee within the stat. of 32 H. 8. c. 34^b."

And in *Smith v. Tyndal*^c, it is one of the resolutions of the court, "that though a cestuique use is in the post, and not in the per, yet he may take advantage of a warranty annexed to his estate; ratio est, because by the statute of uses, the estate in law in possession is transferred to his use, and he is tenant of the legal estate, and has all advantages, that the tenant had before to defend his estate; therefore he may rebut, for that is to defend; but he cannot vouch, for that is to recover in value for the loss."

In the case of *Roll v. Osborne*^d, Warburton thought, "that the stat. 27 H. 8. of uses gave the benefit of the warranty to cestuique use, and that he shall vouch as assignee, and have warrantia chartæ; and that tenant for life created by an use, shall have benefit for his time of the warranty, and may vouch, or have warrantia chartæ; but that he must make his count accordingly."

SECT. IV.

Of limitations
of uses which
agree with the
rules of the
common law.

IV. I proceed to explain, in what respects legal estates created, or uses executed, by

^b Co. Litt. 215. a. b. *Ap-
powel v. Monnoux*, Mo. 97.
3 Leon. 225, in Scot's case,

^c 2 Salk. 685.

^d Mo. 859. pl. 1180.
Trin. 9 Jac.

the statute, correspond with the rules of the common law.

Sect. IV.

Of limitations of uses which agree with the rules of the common law.

And first, with respect to the limitation of estates in fee-simple.

It is settled, that the same words, which are necessary to create an estate in fee upon a conveyance at common law, are equally necessary upon a conveyance to uses since the statute. It is true, that if before the statute, a man had bargained and sold his lands for a valuable consideration, without having limited the use to the heirs of the bargainee, chancery, which considered the intention of the parties, would have decreed an estate *in fee*. But as the statute now executes the use, and the bargainee has a legal estate, the same construction must be had upon this legal estate by the statute, as upon estates by the common law; and, therefore, in the case put, the bargainee since the statute, can only have an estate for life^f. So it seems, that if a feoff-

As to estates in fee-simple.

(124.)

For life.

* 1 Co. 100. b.

^f Corbet's case, *ibid.* 87. b. Jenkins, 332. pl. 65. "The use of a fine is limited to A, by indenture, without mention of any estate in particular: this is an estate for life."

It is proper to notice in this place the case of Kenworthy v. Bate, 6 Ves. 793. An estate was settled by deed

"to the use of such child or children of B. P. (without adding, for such estate or estates), as the said B. P. should by will appoint." The Master of the Rolls is reported to have said, "In this case, there is an absolute power to give the *fee-simple* to any one of the children."

It is probable, that the

SECT. IV.

Of limitations
of uses which
agree with the
rules of the
common law.

ment be made to the use of B. and his *heirs male lawfully engendered*, as this limitation would at common law have created an estate in fee-simple, so it will upon a conveyance to uses⁵.

Estate tail.

(125.)

(2.) It is a rule generally established, that the word *heirs* is necessary to create an *estate tail* upon a conveyance at common law^b. It is the same with respect to a deed operating by way of use. Therefore, if a feoffment be made to the use of J. S. and the *issue*, or *issue male*, of his body, this limitation cannot raise an estate tail in J. S.ⁱ In the case of Leigh

Master of the Rolls did not advert to the omission in the power of the words, "for such estate or estates;" for it would be difficult to show, that the power without these words would authorize the appointment of the legal estate in fee-simple to a child. If the estate had been settled by the deed itself "to the use of the child or children of B. P.," without adding words of limitation, the children would, beyond doubt (even in the case of a will, *Foster v. Romney*, 11 East, 594.), have taken life-estates only: and the power merely authorizing an appointment "to the use of such child or children;" upon what ground can the limitation of the use by the exercise of the power be more extensive, than the same limitation

would have been, if originally inserted in the deed itself? In a subsequent case of a will, where there is a greater latitude of construction, the Court of King's Bench considered the words, "in such manner and form," to be equivalent to the words, "for such estate or estates;" but declined to give any opinion upon the effect of a power, where there were no words of a similar import. See *King v. Marquis of Stafford*, 7 East, 521. 526.

⁵ *Abraham v. Twig*, Cro. Eliz. 478. note 2. Har. Co. Litt. 20. b.

^b Co. Litt. 20. a. § Inst. 334.

ⁱ *Nevel v. Nevel*, 1 Roll. Ab. 837. 1 Brownl. 152. *Makepeace v. Fletcher*, Com. Rep. 457.

v. Brace, a feoffment was made to A. and B.^k, and their heirs, to the use of W. B. for life, with remainder to the use of T. B. and his heirs for ever; and for default of *issue* of the body of T. B., remainder over. It was adjudged, that T. B. took an *estate tail*. This case, however, cannot be considered as an authority against the rule alluded to: for as the limitation was to T. B. and his *heirs*, the subsequent words, *in default of issue of the body*, were only intended to explain the extent of the preceding limitation, or what particular class of *heirs* should take, viz. *heirs of the body*. In this view, the same limitation would have created an estate tail at common law¹; and it is observable, that none of the reporters of this case (except Carthew) mention, that it was determined upon the principle, that limitations in a conveyance, operating by way of use, should be construed in a different manner from mere common law conveyances. But admitting the case to have been adjudged upon the principle stated by Carthew, the subsequent case of *Makepeace v. Fletcher*^m has established the doctrine in *Nevel v. Nevel*.

SECT. IV.

Of limitations of uses which agree with the rules of the common law.

(126.)

^k Carth. 343. 3 Salk. 337.
¹ Ld. Raym. 101. Rep.
 Temp. Holt, 668. 5 Mod.
 266.

^l See Perk. s. 171. 173.
 Year Book 19 Hen. 6. 74.

per Vampage. Co. Litt. 21.
 s. Note to 1 P. W. 57. 2
 Vol. of Cases and Opinions,
 279. Mr. Booth's opinion.

^m Com. Rep. 457.

SECT. IV.

Of limitations
of uses which
agree with the
rules of the
common law.

Words of modi-
fication.

(127.)

(3.) Whether words *regulating* or *modifying* an estate created by a deed, operating by way of use, shall be construed in a different manner, when applied to a common law conveyance, is a point not fully settled. Lord Hardwicke, in a case where the question was, whether the words, *equally to be divided*, would create a tenancy in common, in a deed operating by way of use, observed, that though *limitations* in a deed to uses could have no greater latitude than in common law conveyances, yet as to words of mere *regulation* or *modification* of the estate, he saw no harm in giving them a reasonable construction to answer the intention; and he accordingly held, that those words created a tenancy in common^a: on the other hand, lord Thurlow, in a case nearly similar^b, expressed himself thus: "The question is, whether *deeds to uses*, in the "nature of wills, should be construed so "widely as wills have been? I should be sorry "to give into this; for I think no good has "been done by the wide construction of "wills."

As to the ceasing
of the estate of
tenant in tail
during his life.]

(4.) It is a maxim of law, that a condition or limitation annexed to an estate ought to destroy the *whole* of the estate, to which it is

^a Rigden v. Vallier, 2 1 Wils. 341. and 2 Vent.
Ves. 252. 257, 3 Atk. 731. 365.

See also Goodtitle v. Stokes, ^b Stratton v. Best, 2 Bro.
Cha. Rep. 233.

annexed, and not a *part* only of it^p. This rule is applicable to limitations by way of use, which operate so as to defeat or avoid estates: therefore, if an estate be limited to the use of J. S. *in tail*, with a proviso, that if he do such an act, his estate shall cease *during his life*, this proviso is void^q. It was agreed, that lands should be limited to the use of H. C. and the heirs male of his body, with divers remainders over, and with this proviso, "That if the said H. C., or any of the heirs males of his body, should attempt or make any feoffment, &c., that *his estate* should cease, *as if he was dead*, and that then the said W. B. and the other feoffees, and their heirs, should stand seised to the use of such person to whom it ought to descend or remain by the said deed intended, as if he was dead, with the remainders over as aforesaid." The proviso was considered repugnant and void^r. However, as a condition may be annexed to an estate tail to determine it *wholly* by the re-entry of the donor or his heirs^s, so a limitation by way of use may enure to defeat an estate tail, as if tenant in tail were dead, *without heirs of his body*^t. This doc-

SECT. IV.

OF limitations of uses which agree with the rules of the common law.

(128.)

^p 1 Co. 86. b. 4 Burr. 1941. Litt. a. 720, 721, 722, 723.

^q 1 Co. 86. b.

^r Chelmley v. Humble, cited 1 Co. 86. a. See Corbet's case, *ibid.* 83. b. Mild-

may's case, 6 Co. 40. a.

Tarrant's case, Moor, 470.

^s Litt. a. 362. Croker v.

Trevithin, Cro. Eliz. 35. 1

Leon. 292.

^t Vide Mary Portington's case, 10 Co. 36.

SECT. IV.
Of limitations
of uses which
agree with the
rules of the
common law.
(129.)

trine has given rise to the introduction of two species of provisos in modern practice. The one is adopted in a settlement of estates, where it is intended, that the person in possession of them, under the settlement, should use the name, and bear the arms of the settlor; and in case of refusal or neglect, that the uses and estates thereby limited shall cease and determine, as if the person so refusing or neglecting, being tenant for life, were dead, or, being tenant in tail, were dead without issue, inheritable under the intail^a. The other proviso is used in settlements, for the purpose of defeating the estate of a tenant in tail, in case he shall become entitled to a certain other estate; and limiting or shifting the use upon that event, to another person, as if such tenant in tail were dead without issue^v.

Fractions in the
limitations of
the use.

- (5.) Another maxim is, that a man cannot make a fraction in an estate, in the case of a limitation by way of use, which cannot be done in a conveyance by livery in possession. Therefore, *Walmesley*^w, justice, said, "If a
(130.) "man makes a feoffment in fee of land to
"the use of A. and his heirs every Monday,
"and to the use of B. and his heirs every

^a See the form of such power, Butl. note, 2 Co. Litt. 327. a. and 2 Bridg. Con. 8. 10. 469. 575. and Appendix I.

^v See Appendix II. 1

Bridg. Con. 304. also *Nicolls v. Sheffield*, 2 Bro. Cha. Ca. 315. *Doe v. Heneage*, 4 Term Rep. 13. *Stanley v. Stanley*, 16 Ves. 491.

^w 1 Co. 87. a.

"Tuesday, and to the use of C. and his heirs
 "every Wednesday, these limitations are
 "void, for we do not find any such fractions
 "of estates in law."

SECT. IV.

Of limitations
 of uses which
 agree with the
 rules of the
 common law.

(6.) It remains to observe, that the statute executes no limitation of a use, which if executed would be fraudulent, and thereby abrogate the law. Thus, if there be a limitation to the use of A. and his heirs, provided that if he give a mortal blow to any person, the use shall cease as to him, and remain over; this is fraudulent to prevent an escheat, and therefore void⁷.

Uses cannot be
 limited so as to
 abrogate the
 law.

V. However, in some cases the manner of creating and limiting estates has undergone considerable alterations since the introduction of conveyances to uses.

SECT. V.

Of limitations
 of uses, and
 creation of legal
 estates by the
 statute, which
 differ from the
 rules of the
 common law.

(1.) It was absurd, that a man should make a conveyance or give possession by livery of seisin to himself; and therefore if a feoffment had been made to a stranger and the feoffor, the stranger took the whole⁸. But now, if a feoffment be made to the use of the feoffor, or to the use of the feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone in the first instance, and in him and the stranger in the second. As this manner of limiting the

Of uses limited
 to, and legal
 estates vested in,
 the grantor by
 his own con-
 veyance.

(131.)

⁷ Moor, 633. ⁸ 3 Atk. 180. ⁹ Perk. s. 203.

Sect. V.
Of limitations
of uses, and
creation of le-
gal estates by
the statute,
which differ
from the rules
of the common
law.

(132.)

use to, and vesting the legal estate in, the feoffor, releasor, &c. by one and the same conveyance, is quite contrary to the simple mode of conveyancing adopted by the common law, so it is the more convenient and the less expensive method. Thus, for example, it frequently happens, that upon the death or removal of trustees, it becomes necessary to fill up their number pursuant to a power for that purpose usually introduced into settlements of real property. In order to effect this, it is now the practice for the old trustees to make a conveyance, which operates by way of transmutation of possession (generally by lease and release) unto the new trustees and their heirs, to the use of the old and new trustees and their heirs^a. Without the assistance therefore of the statute of uses, it would have been necessary in the above case, that the old trustees should have first enfeoffed A. B., who would have re-enfeoffed the old and new trustees jointly; thereby making two conveyances necessary. Indeed, in the case of terms of years and other personal property, two assignments are still required for the above purpose^b.

As a man could not at common law convey to himself, so neither could he make a con-

^a See precedents, 1
 Horsm. 319. 334 to 343.

^b See a precedent, 1
 Horsm. 303 to 307.

veyance to his wife^c; but by limiting a seisin to the feoffee, releasee, &c. he may declare the use to his wife, which use will be executed by the statute^d.

SECV. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

This method of vesting the legal estate in the grantor by his own conveyance can be effected by a feoffment, fine, recovery, or lease and release; for in each of these, the seisin is conveyed to the feoffee, &c., and that seisin is sufficient to serve uses declared to the feoffor, &c., or to any other person. But in a bargain and sale, where the use first passes, and then the possession is executed in the bargainee by the statute, no other use can be declared upon his estate; according to the rule, that a use cannot be limited to arise out of a use^e. And yet a man may covenant to stand seised to the use of himself.

(133.)

(2.) By the common law a man could not make his own heir a *purchaser*, even of an estate *tail*^f. This maxim was indeed a necessary consequence of the preceding rule, that a man could not convey, nor limit a remainder, to himself; for *filius est pars patris*^g—*haeres est pars antecessoris*^h. Therefore if a

Of uses limited to the heirs of the body of the grantor, so as to take by descent or purchase.

^c Co. Litt. 3. a. 114. a. *Moyse v. Gyles*, 2 Vern. 385. *Lucas v. Lucas*, 1 Atk. 271. note 2. last ed.

^d Co. Litt. 112. a.

^e Dyer, 155. a. b. 1 Co. 136. b. 137. a.

^f Co. Litt. 22. b.

^g Moor, 720. Dyer, 9. pl. 20.

^h Co. Litt. 22. b.

SECT. V.

Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.
(134.)

gift had been made in tail or for life, with remainder to the heirs male of the body of the grantor, this remainder would have been void¹. But since the introduction of uses, a man may limit the use, so as to make his heirs *special* take either by *purchase* or by *descent*. Thus, if J. S. make a feoffment to A. in fee, to the use of himself for life, with remainder to the use of the heirs of his body; this is a good estate tail executed in J. S.^k So if the use be limited to A. for life, with remainder to the heirs of the body of J. S., in this case also the heirs of the body will take by *descent*^l: for as the limitation to A. for life *may* determine during the life of J. S. (the grantor), the law implies a use in J. S. for life, expectant upon the determination of the estate of A.; according to the principle, that so much of the use, as is not disposed of, results to the grantor; and this implied estate in J. S. for life in remainder, is sufficient to consolidate with the limitation to the heirs of his body; pursuant to the rule, that where there is a limitation to the ancestor for life, with a limitation to his heirs, or heirs of his body, in the same conveyance, the heirs, or heirs of the body, do not take by *purchase*, but by *descent*^m. But if a feoffment be made to the

(135.)

¹ Greswold's case, Dy. 156. a.

^k Co. Litt. 22. b.

^l See Wills v. Palmer, 5 Burr. 2615. ² Black. 687.

^m See Fearn, 54 to 62. 4th ed.

use of A. and his heirs *during the life of the grantor*, with the remainder to the use of the heirs of the body of the grantor; as the use is expressly limited away during the life of the grantor, there can be no *implied* estate in him, so as to consolidate with the limitation to the heirs of his body, and therefore his issue must in that case take by *purchase*ⁿ.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

But a grantor cannot even under a conveyance, which operates by way of *use*, enable his heir *general* to take a remainder as purchaser, under a limitation to his *heirs*; but where the limitation is to the right heirs of the grantor, the use so limited, is construed to be the *old* use, and will be executed in him as the *reversion in fee*, and not as a *remainder*^o. Thus if a fine be levied to the use of the wife of the conuzor for life, remainder to the use of another in tail, remainder to the use of the right heirs of the conuzor; the last limitation of the use is void as a *remainder*; for the *old* use of the fee continued in the grantor as a *reversion*^p. So where a feoffment was made to the use of the feoffor for 40 years, without impeachment of waste, and afterwards to the use of C. his second son in tail male, with

(136.)

ⁿ Tippin v. Cosin, Carth. 272. 4 Mod. 380. Else v. Osborne, 1 P.W. 387. See Fearnie, 62.

^o See 1 Co. 129. b. 130. a. Godolphin v. Abingdon,

2 Atk. 57.

^p Fenwick v. Mitford, Moor, 284. 1 Leon. 182. Co. Litt. 22. b. Read v. Errington, Cro. Eliz. 321. S. C. Semb.

Sect. V.
Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

remainder to the use of the right heirs of the feoffor; it was determined, that the use limited to the right heirs was the *old* use; that it was void as a *remainder*, and was merely the *reversion*^a.

The difference is material. The grantor taking the limitation to his *right heirs*, as a *reversion*, it is his property, and he may *grant* or *devise* it. But if the *right heir* took as a *purchaser*, the *remainder* would belong to *him*, and the grantor himself would be excluded^b.

Sir Francis Bacon has observed, "that the
"very letter of the statute doth take notice
"of a difference between an use in *remainder*
"and an use in *reverter*; which though it can-
"not be properly so called, because it doth
"not depend upon particular estates, as re-
"mainders do, neither did they before the
"statute draw any tenures, as *reversions* do;
"yet the statute intends, that there is a dif-
"ference, when the particular use and the use
"limited upon the particular use, are both
"*new* uses; in which case it is a use in *re-*
(187.) "*mainder*; and where the particular use is a

^a Earl of Bedford's case, Moor, 718. 1 Co. 130. a. Cro. Eliz. 834. Har. Co. Litt. note 3. 22. b. Bingham's case, 2 Co. 91. b.

^b "Lands granted by A. by fine, for the life of A.,

"remainder to A.'s right heirs. It is a reversion in A., and he may grant it." Note 3. Har. Co. Litt. 22. b. See Jenk. 246. pl. 38. and ante 59: in note.

"new use, and the remnant of the use is the
"old use, in which case it is a use *in re-*
"verter".

SECT. V.

Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.
Of limiting the
use by the *Ac-*
brendum to a
person not
named in the
premises.

(3.) Again: by the common law, generally speaking, no person could take a present interest by the *habendum* of the deed, who was not named in the premises¹. But in a case², where A. enfeoffed B., *habendum* to the said B. and C. their heirs and assigns, to the use and behoof of the said B. and C. their heirs and assigns; it was resolved, that as C. was not named in the premises, he could take no possession originally by the *habendum*; and that the livery, made according to the intent of the indenture, did not give any thing to C., because as to him it was void: but though the feoffment did not give any *seisin* to C., yet it did to B. and his heirs, which *seisin* was sufficient to serve the use declared to C. Therefore the use limited to B. and C. was good, and the statute executed it. But this limitation of the use in a bargain and sale to a person not named in the premises, after a previous disposition of it to the bargainee, would be void, for the reasons before mentioned.

(138.)

¹ Bac. Uses, 45, 46.
² 2 Roll. Ab. 67. Hob.
313. note 4. Har. Co. Litt.
26. b. But see *Spry v.*
Popham, 3 East, 115.

³ *Samme's case*, 13 Co.
55. See as to an exception:
after an estate limited by
way of use, *Tregmiell v.*
Reeve, Cro. Car. 437.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Of uses limited to two, the one being incapable.

(4.) So it is a rule of law, that if an estate be conveyed to two, the one being capable, and the other incapable, at the time of the grant, he who is capable shall take the whole^a; and that *joint tenants* cannot take at different periods^b. But since the introduction of uses, if A. make a feoffment in fee, to the use of B. and his wife, that shall be; though the whole estate will vest in B. at first, yet upon his marriage the wife shall take jointly with him^c. So if a disseisin be had to the use of two, and the one agrees to it at one time, and the other at another, they shall be *joint-tenants*^d.

Of uses limited in futuro, and to persons not in case, where no particular estate is expressly limited.

(139.)

(5.) No estate of freehold can by the common law be granted to commence *in futuro*^e; neither can a contingent remainder be supported without an express particular estate of freehold. Therefore, if a grant be made to B. and his heirs to commence four years after the grant, or to A. for years, with remainder to the right heirs of J. S. who is living^f, in either case the grant is void. But if a conveyance be made to J. S. for life, with remainder to the first son unborn, or right heirs, of J. D.; or if a feoffment and livery be made

^a 1 Co. 100. b. 2. 13 Co. 57.

^b Co. Litt. 9. a. 188. a. 2 Roll. Ab. 417. pl. 8.

^c Mutton's case, Moor, 96. Dyer, 274. b. 1 Co. 101. a. Samme's case, 13 Co. 57. See Wells v. Fen-

ton, Moor, 634. Stratton v. Best, 2 Bro. Ch. Ca. 233.

^d Co. Litt. 188. a. 13 Co. 57.

^e Barwick's case, 5 Co. 94. b. 2 Vent. 204. Roe v. Tranmer, 2 Wils. 75.

^f Co. Litt. 217. a.

to J. S. for ten years, with remainder to J. D. and his heirs; in these cases the intervening estates are sufficient to support the remainders. Now in conveyances to uses, the courts have supported these future limitations, when no particular estate has been created, either in the shape of remainders, or as springing uses^a. Thus, if a man covenant to stand seised to the use of the heirs of his own body^b, or to the use of another after his own death^c, or if he bargain and sell his lands after seven years^d; in each of these cases the grant is good, and until the event takes place, the use results. But in conveyances operating by way of transmutation of possession, it is necessary, that a present seisin should be transferred, in order to serve the resulting use. Thus if a feoffment, or lease and release, be made to J. S. and his heirs, to the use of J. S. and his heirs, to commence four years from thence, or after the death of the grantor^e, the limitation of the use to J. S. is good, for during the four years, or the life of the grantor, it will result and be executed. But if the conveyance had been to J. S. and his heirs after the death of the grantor, to the use of J. S. and his heirs; it would have been void; because it is the

Sect. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(140.)

^a See 1 Atk. 586.

^b Carth. 263. See 22 Vin.

283. pl. 2. and the cases collected in the note.

^c *Daman v. Sheafe*, 3 Lev.

970. *Roe v. Tranmer*, 2 Wils. 75.

^d Bac. Uses, 63.

^e See 2 Salk. 675. and the above cases.

Sect. V. grant of an estate of freehold to commence *in futuro*¹.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law. (141.)

When a feoffment is made to A. and his heirs, to the use of the heirs of the body of the grantor, the limitation to the heirs of the body takes effect upon the death of the grantor, not as a springing use, but as a remainder; and the use resulting to the grantor for his life by way of particular estate, the grantor, by the union of the particular estate and the remainder, becomes tenant in tail in possession². If the whole fee had resulted to the grantor, the heirs of his body would have taken, as purchasers, by way of springing use: but the decision is formed upon the true construction of the statute of uses; that so much of the use, as the grantor has not disposed of, and no more, results to him.

But in other cases, not substantially differing, as it appears to me, in principle, from the above, another construction is said to have been established. In *Davies v. Speed*, 2 Salk. 675. the chief justice held, "that a feoffment to the use of A. and his heirs, to commence four years from thence, was good as a springing use, and that the *whole* estate remained to the feoffor in the mean time; so it is, if

¹ *Roe v. Tranmer*, 2 Wils. Vin. 283. and the cases 75. *Lamb v. Archer*, 1 cited in note, pl. 2. and 2 Salk. 225. Freem. 235. pl. 307. 258. ² 1 Roll. Rep. 240. 22 pl. 326. Ante 97, 98.

"it were to commence after the death of A. without issue, if he died without issue in "twenty years." This doctrine is assumed by others^b; but it does not appear to have been considered with any degree of attention. Bacon (63), expressly says, "If I bargain "and sell my land after seven years, the inheritance of the use only passeth; and there "remains *an estate for years* by a kind of sub- "traction of the inheritance;" and this seems to be the proper construction of the statute.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

In the case of *Davies v. Speed*, before noticed, a husband and wife, seised in right of the wife, convey by fine and deed to the use of the heirs of the body of the husband on the wife begotten; and for default of such issue, to the use of the right heirs of the husband. They had issue, which died in the lifetime of the husband and wife. The wife dies; then the husband dies; and the question was, whether the limitation to the right heirs of the husband was good? According to Salkeld's report of this case, it is said to have

^b See Pollex. 30. in the case *Weale and Lower*; and the case of *Carwardine v. Carwardine*, *Fearne by Butler*, 388. In the case of *Pybus v. Mitford*, 1 Ventr. 379. Hale, chief justice, says, "so if he covenants to "stand seised to the use of "J. S. after 40 years, there

"is a fee-simple determinable in the covenantor." This is intelligible: for till the expiration of the term of 40 years, the covenant does not take effect. Until that period, there is not any seisin to a use. See also 1 Leon. 194.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

been determined; first, that no estate for life resulted to the *husband*, because the estate belonged to the wife; "secondly, this limitation *to the heirs of the body of the husband, &c.*" was merely void; for taking it as a remainder, there is no precedent estate of freehold to support it; and taking it as a springing use, then it is a springing executory use to arise after a dying without issue, which the law will not expect."

There is a manifest error in this report of the second resolution, by referring to the limitation to the heirs of the body of the husband and wife, instead of the limitation to the right heirs of the husband; for the question was, whether the limitation to the right heirs of the husband was good; and unless the resolution is taken with reference to that limitation, then the observation, "taking it as a springing use, then it is a *springing* and *executory* use to arise *after a dying without issue*," would not have been applicable.

Springing uses.

But the conclusion in that case, that the limitation to the right heirs of the husband was void as a springing use, is not very intelligible. A springing use indeed, to take effect after a general dying without issue, where it is not preceded by an estate tail in the issue, is, no doubt, illegal; but that was not the case in *Davies v. Speed*. Admitting,

in that case, that the use did not result to the wife and her heirs by way of particular estate, so as to support the limitation to the heirs of the body of the husband and wife as a contingent remainder, still the limitation to the heirs of the body might have been good as a springing use, to take effect upon the decease of the husband; and if that limitation had taken effect, there could have been no objection to the limitation to the right heirs of the husband, either as a remainder expectant upon, or as a springing use to take effect after, the estate tail^a; for in either case a recovery by the tenant in tail might have destroyed it: and if the limitation to the heirs of the body did not take effect, then the limitation to the right heirs of the husband, must of necessity have taken effect upon his death, and therefore not within the reasons of a perpetuity. The limitation, as it appears to me, to the right heirs of the husband, might, according to the event, have taken effect, either as a remainder, or as a springing use; and during the life of the husband, or the suspense of the contingency, it was uncertain in which way. If there had been at the death of the husband, any person answering the description of heir of the bodies of husband and wife, such heir could have taken an estate tail under the springing use to him, with a

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

^a The words would have created an estate tail. See *Mandeville's case*, Co. Litt. 26. b.

SECT. V. vested remainder to the right heirs of the husband; but if there had been no person answering that description at the death of the husband, then the limitation to his right heirs might have been good as a springing use; as a remainder, therefore, to take effect after an estate tail, it would have been good; and it would have been valid as a springing use to arise upon the decease of a person *in esse*.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(142.) In the case of *Adams v. Savage*^b, where lands were conveyed by lease and release to trustees and their heirs, to the use of A., the releasor, for ninety-nine years, if he should so long live, remainder to the use of the trustees for twenty-five years, remainder to the use of the heirs male of the body of A., it was determined, that no use for life resulted to A., and consequently, that the remainder to his heirs male was void, there being no freehold estate previously limited to support it.

If the above limitations had been in a will, instead of a deed, the limitation "to the heirs male of the body of A.," would have been good, as an *executory devise*^c; and there does not appear to be any satisfactory reason, why that limitation, in the case cited, should not have been supported, as a springing use. But it

^b 2 Salk. 679. Lord Raym. 854.

^c *Harris v. Barnes*, 4 Burr. 2157. *Gore v. Gore*, 2 P. W. 28.

is singular, that the court did not, either in this case, or in the case of *Rawley v. Holland*^d, consider the limitation upon the doctrine of springing uses: they determined, that the limitation was void, as a remainder; but they did not, it should seem, advert to the circumstance, that it might have been good, as a springing use^e.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law,

Probably the fact is, that at the time, when the cases of *Adams v. Savage*, and *Rawley v. Holland*, were determined, the limitation, in each of those cases, "to the heirs male of the body," was considered as too remote, even if it had been an *executory devise* under a will: in the one case, the limitation being to take effect after a life in being, and a term of twenty-five years; and in the other, after a life in being, and a term of 200 years: for it does not appear to have been settled, until the case of *Gore v. Gore*^f (1722), that the *freehold* might become vested under an *executory devise*, although such freehold estate were preceded by a term of 200 years, or upwards. The case of *Adams v. Savage* was determined in 1701, and *Rawley v. Holland* in 1712.

^d 22 Vin. 169. pl. 11.

^e Sergeant Hill, in a MS. note to *Adams v. Savage*, Salk. 679. makes a query, "If this would not be as

"good as a springing use, as it would in a will be a good executory devise?"

^f 2 P. W. 28.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Of springing or shifting uses after or upon a limitation in fee.

(143.)

(144.)

(6.) It is a maxim of the common law, that no estate can be limited upon a fee-simple; or, in other words, an estate in fee-simple cannot be made to cease as to one, and take effect by way of limitation, upon a contingent event, in favour of another person. Thus if a feoffment had been made in fee, with a proviso to make it cease as to the feoffee, and go over to a stranger upon the payment of a certain sum, &c., this limitation was void^a. For as a remainder it could not take effect; a remainder being a *remainder* of an estate in lands or tenements expectant upon a particular estate^b: and as a condition it was void, for no person can take advantage of a condition, but the grantor and his heirs^c. But it is established now beyond controversy, that limitations of the above nature may take effect by way of use.

The principle seems to have been acknowledged at a very early period. In Brooke's Abridgment^k, it is admitted, that if a man make a feoffment in fee to the use of W. and his heirs, until A. pays a certain sum to W., and then to the use of A. and his heirs; the

^a See Co. Litt. 18. a. Seymour's case, 10 Co. 97. b. 1 Salk. 231. pl. 9. Dyer, 93. a. 1 Co. 85. b. 10 Mod. 423. Plowd. 29.

^b Co. Litt. 143. a. See Fearn, 8. 4th ed.

^c Doctor and Student. Dial. 2. c. 20, 21. Perk. a. 631. Litt. a. 347.

^k Bro. Feoff. al. Uses, pl. 30. cites 6 Ed. 6. B. N. C. pl. 423.

use is first executed in W. by the statute; but when A. pays the money, the use upon such payment shifts from W., and vests in A. But in that case (which was determined before the rule was clearly settled, that all future or springing uses must be served out of the seisin of the grantees), it was said, that, to avoid all doubts, A. should enter in the name of the feoffees, and in his own name.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law. (145.)

So where a fine was levied to the use of A. and his heirs, if R. should not pay a certain sum to A. at an appointed time, and if he should, then to the use of A. for life, remainder to the use of R. in fee; upon the payment of the money it was held, that the uses would change according to the limitation¹.

It seems, that a shifting or springing use, after a previous limitation of the fee, cannot be barred by the cestuique use by any kind of conveyance. Thus, if land be given to the use of A. and his heirs, until B. pay him 10*l*., and then to the use of B.; A. cannot bar this contingent use^m. A contingent, or shifting use, in this respect differs from a contingent

Whether a shifting use, after a limitation of the fee, can be barred.

(146.)

¹ See *Spring v. Caesar*, 1 Roll. Ab. 415. pl. 12.—For other instances of springing uses after a previous limitation of the fee, I must refer to the cases of *Harwell v. Lucas*, Moor, 99. and earl

of *Kent v. Steward*, Cro. Car. 358.

^m *Lloyd v. Carew*, Prec. Cha. 72. Pig. Rec. 134. Palm. 182. 135. Vide Bro. Feoff. al. Uses, pl. 50. B. N. C. 157.

SECT. V.
Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

remainder, which may be destroyed: but it agrees with an executory devise after a previous devise of the fee; as it was determined in *Pells v. Browne*^a. However^c, if a man covenant to stand seised to the use of himself in fee, until marriage, and then to the use of himself and his intended wife, and the heirs of his body, with remainders over; he may before marriage destroy the future or contingent uses, by making a feoffment in fee, in tail, or for life, upon a good consideration, and without notice: but a lease for years would not destroy it, although it would bind the future use^d.

(147.) We may reconcile the last case to the preceding rule in this manner; if the seisin, out of which the springing or future use is to arise, be destroyed, the future use cannot take effect: therefore if A. covenant to stand seised to the use of such a wife, as he shall hereafter marry; until the marriage the use results to himself in fee, and it is out of his seisin, that the use to the wife must arise: now if he destroy that seisin before the use comes *in esse*, the use consequently cannot be

^a Cro. Jac. 590. 1 Eq. Ab. 187.

^c Wood v. Reingold, Cro. Eliz. 764, 765. 854. Cases collected in note to pl. 4, 32 Vin. 225. and pl. 1. 224,

See also Gilb. Uses, 125.

^d See Bould v. Wynston, Cro. Jac. 168. Sed contra Semb. Barton's case, Moor, 742. as to the lease for years,

served⁹. But if A. make a feoffment to B. in fee, to the use of C. in fee; but if D. pay so much money, then to A. in fee; here if C. (who has the legal estate since the statute) make a feoffment, suffer a recovery, or levy a fine, the use to A. is not barred from taking effect; because that shifting use is served out of the seisin of B. the feoffee, and not out of the estate of cestuique use. But it appears to me, that if in this case B. (the feoffee) should join with C. in making a feoffment, the seisin, or *scintilla juris*, of B. would be completely destroyed, and in that case no future use could arise to A. Indeed, if it is admitted, that there is a possibility of seisin remaining in the feoffee, to serve the contingent uses, it will follow that it may be destroyed by release or feoffment.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Brent's case⁹ was in effect thus: R. B. made a feoffment to the use of himself and D., his wife, for their lives, with remainder, if R. B. survives D., to the use of such woman as R. B. should afterwards marry, for her jointure; remainder to the use of J. S. in fee.

J. S. and the feoffees, with the consent of R. B., join in a feoffment to other uses; and

⁹ The case in B. N. C. 137. which is contra, is denied to be law, 2 Sid, 98.

⁹ 17 Eliz. 2 Leon. 14; Dyer, 329, pl. 48.

SECT. V.

Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

then R. B. levies a fine to the same uses, and marries a second wife.

The question was, whether the contingent use to the second wife was not destroyed by the feoffment of J. S. and the first feoffees? It appears, that the point was not judicially determined: but in *Dillon v. Freine*, Poph. 76. Anderson says, "And for Brent's case, I have always taken the better opinion to be, that the wife cannot take in the case for the mean disturbance, notwithstanding the judgment, which is entered thereupon, which was by the assent of the parties:" and in *Woodliff v. Drury**, which was the case of a feoffment before marriage, to the use of the feoffor and his intended wife after the marriage, and the heirs of their bodies (no use having been limited until the marriage); all the justices held, "that although the feoffor be seised in fee until the marriage, yet by the marriage the new use shall arise, if there be no act in the mean time to destroy the future use, as in *Chudley's* case."

The argument in *Perrot's case*† appears to me very satisfactory: "a disturbance, which will impede the future use, ought to arise on the

* Cro. Eliz. 439.

† Moor, 368, 390, 391. pl. 506. 36, 37 Eliz.

“ part of the feoffees; as if an alien is enfeoffed
 “ to a use^a, upon office found, the use is destroy-
 “ ed per 11 Regin. Dyer, fol. 283., in the case
 “ of the King v. Jasper; or if one, who had
 “ committed treason or felony, is enfeoffed to
 “ uses, and afterwards is attainted, the use is
 “ destroyed^b: and that was the case of *Francis*
 “ *Throckmorton*, who was attainted for treason
 “ in the 26th Eliz.: he was conuzee in a fine to
 “ the use of Mrs. Scudamore, his sister, for
 “ her jointure, and that was after the treason
 “ committed, but before the attainder; and
 “ after his attainder, his sister sued to the
 “ queen, who granted to her the land by the
 “ advice of *Monsieur Plowden, et divers autres*
 “ *à grand learning en le ley.*”

SECT. V.

Of limitations
 of uses, and cre-
 ation of legal
 estates by the
 statute, which
 differ from the
 rules of the
 common law.

“ So if the feoffees, before the future use
 “ shall arise, disable themselves from being
 “ seised of the land by their *feoffment*; as in
 “ Chudley’s case.”

“ And so 17 Eliz. Dyer, 340. (*Brent’s case*),
 “ where the use was limited to such woman
 “ as he should marry, and before marriage he
 “ requires his feoffees to make another feoff-
 “ ment over: in these cases the future use is
 “ prevented (*prævent*) by the opinion of the
 “ greater part of the judges, who argued the
 “ case of *Dillon v. Friene*.”

^a Bacon, Uses, 59.^b Ibid. 58, 59.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Of shifting uses upon, or after, a previous limitation in tail or for life.

(148.)

(149.)

“ And so it seems, if the feoffees had been barred of seisin by collateral warranty, or the like.”

(7.) It is a maxim of the common law, that every remainder must be limited, so as to await the determination of the particular estate, before it can take effect in possession^w. Therefore if an estate be limited to a person in tail, or for life, with a condition for making it cease upon an event, which may happen before its regular determination, this condition is void: for it cannot operate as a remainder for the reason just stated; and as a condition to vest the subsequent limitation by the entry of the grantor, it can have no effect; for supposing the grantor to enter for a condition broken, such entry would avoid the first livery, and of course destroy the remainder, which was created by that livery. But it is now clear, that if a seisin in fee be limited to J. S. to the use of A. in tail, or for life, provided that if B. return from Rome, then the lands shall remain to the use of C. in fee; the limitation to C. will vest in abridgment of the estate limited to A.^x

Of the distinction between shifting uses and conditional limitations.

It appears to me, however, that limitations of the nature just mentioned, which operate,

^w Plowd. 24. Fearne, 9. Cro. Eliz. 360.
^x 390. 394. Cogan v. Cogan, See 2 Leon. 16.

so as to determine the preceding particular estate, before its regular expiration, can be effected without the aid of springing or shifting uses, and that by a species of limitation, which is not properly a remainder, nor condition, but which is distinguished by the name of a *conditional limitation*^a: an expression and idea, as Mr. Douglas has in my opinion properly said^a, originally adopted to evade the necessity of the entry by the heir for the purpose of taking advantage of the defeazance of a prior estate. In order to distinguish between springing uses, and conditional limitations, I must observe, that where the grantor parts with the whole fee, and limits the use upon the seisin so transferred to B. in tail, or for life, until C.'s return from Rome, and then to the use of C., &c.: this limitation to C. is termed a springing or shifting use. But where the grantor only parts in the first instance with an estate less than the fee, the estate so created may be defeated by a *conditional limitation*; and upon the determination of it, the next subsequent estate immediately becomes vested without entry or claim^a. But in these cases it is absolutely necessary to make use of words of limitation; which words^b are, *quam diu*, *dummodo*,

Sect. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(150.)

^a See Reeves, 4 vol. 509, 510. Plowd. 27. 32. 34. 414.

^a Dougl. Rep. 727. note 1. See Shep. Touch. 150.

^a Co. Litt, 214. b.

^b Mary Portington's case, 10 Co. 41. b.

SECT. V.
Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

diu, quousque, durante; whereas words of *condition* are, *sub conditione, ita quod, si contingat, provisio*. If words of *condition* are inserted, then the particular estate cannot cease without entry by the grantor or his heirs.

- (151.) Thus if there be tenant for life, with remainder in fee, *upon condition* that tenant for life (being a *feme sole*) should continue unmarried, and she afterwards marry; though the heir of the grantor may enter, yet by such entry he defeats the remainder^c. But if an estate be granted to A. *so long as* she shall continue unmarried^d, or to A. *for life, si tam diu in pura viduitate viveret*^e, and the remainder be granted to B.; upon the marriage of A. her estate determines by the nature of its limitation, and the remainder to B. immediately takes effect^f. So if a gift be made in tail to A. *upon condition*, that if C. return from Rome, it shall thenceforth immediately remain to B.; in this case the limitation over can never take effect as a remainder; because the estate tail cannot cease without an entry by the grantor or his heirs, which entry would defeat the remainder^g. But if a feoffment be made to A. and the heirs of his

^c W. Jones, 58. See also Plowd. 29.

^d W. Jones, 58.

^e Co. Litt. 214. b.

^f See 2 Black. Com. 155.

W. Jones, 58. in Foy v. Hynde. 5 Vin. 63. pl. 13. and note.

^g Co. Litt. 214. b. W.

Jones, 58. Plowd. 413.

body until C.'s return from Rome, and after C.'s return, to B. in fee; here, upon C.'s return, the limitation to B. will vest ^h.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

But when limitations operate by way of shifting or secondary uses, they take effect, whether the words, which cause their taking effect, be words of *limitation* or *condition*ⁱ. Thus where a fine was levied to the use of B. in fee, *upon condition* that he should pay A. (who was the conuzor) 4*l.* per annum, and in default of payment to the use of A. for life; it was said, that as this was limited to the conuzor, it was a *condition*; but if it had been limited to a stranger, it would have been a good *springing use* upon the non-performance of the condition^h. To prove this the case of *Bracebridge* was cited¹, which so far as relates to the present point was, that A. seised of the reversion of some lands; granted them to B. and C. and their heirs; *upon condition* to pay a certain sum on a particular day; and in default thereof to stand seised to certain uses. Default was made in payment, and it was held, that by virtue of

(152.)

(153.)

^h W. Jones, 58. Sed vide *Shep. T.* 121. contra. But the authorities there cited do not support his position.

ⁱ See 2 *Leon.* 16.

^k *Smith v. Warren*, *Cra. Eliz.* 688.

¹ *Moor*, 99. pl. 243. S. C. by the name of *Harwell v. Lucas*; 1 *Leon.* 264. pl. 355. S. C. 2 *Leon.* 221. pl. 281. And 118. S. C. 22 *Vin.* 251. H. a. pl. 3. and note.

SECT. V. the statute 27 Hen. 8. c. 10. the use was divested out of the grantees.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Tenant in tail may bar shifting uses.

It is a general rule, that where an estate tail is limited, and a secondary or shifting use is limited upon it, the tenant in tail may by recovery bar the limitations over^m. Therefore, it is said, "If tenant in tail be with a limitation so long as such a tree shall stand, a common recovery will bar that limitationⁿ."

Within what period shifting uses must take effect,

(154.)

When an estate in fee-simple is granted or devised, with a shifting use or secondary fee limited upon it, this secondary or shifting use must be expressly limited to take effect within the compass of a life or lives in being, and 21 years after; otherwise it will be within the reasons of a perpetuity. This limitation of time is not, as Mr. Hargrave^o properly observes, arbitrarily prescribed; therefore, in the case of a posthumous child, it may be extended to a few months longer. But here we must distinguish, where the whole fee is first limited with a shifting use, or secondary fee upon it; and where the limitation of the use, in the first instance, is

^m Page v. Hayward, 2 Salk. 570. Vide 1 Lev. 35. 1 Sid. 102. See Fearn 15, 16.

ⁿ In the case of Benson v. Hodson, 1 Mod. 111. ^o Har. Co. Litt. 20. a. note 5. See 22 Vin. 252. pl. 4.

in tail. In the former case, we have seen, that the shifting or secondary use must be expressly confined to the period of a life or lives in being, and 21 years, and perhaps a few months over: because, as these kinds of shifting uses are not barrable by recovery, they would tend to a perpetuity. Thus, if an estate be limited to A. and his heirs, and if B. (a person then *in esse*) die without leaving issue *living* at his decease, or if, having such issue, all of them should die under the age of 21 years, then to the use of C. and his heirs; this limitation is good, because it is not limited after a total failure of issue of B. But if an estate be limited to A. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of A. in tail, remainder over; with a proviso, that if B. die, and there should be a total failure of heirs, or heirs of the body of B., then the uses limited to A. and his sons should cease, and the lands remain to the use of C. and his heirs: this limitation to C. is valid; because when the first tenant in tail comes into possession, he may bar it by a common recovery, and therefore there is no danger of a perpetuity^p.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(155.)

^p See *Nicolls v. Shelf*. Henage, 4 Term Rep. 18. *Ante* 119, 120. *2 Bro. 215. Doe v.*

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Of shifting or secondary uses arising upon the execution of powers.

(156.)

(8.) I have noticed such shifting or springing uses as take effect, or arise, upon an event provided for by the deed, in which the original limitations, intended to be defeated thereby, are created. But there is a species of shifting or future use, which arises from the act of some agent or person nominated in the deed; and this is called a use, arising from the execution of a *power*. Every power of this kind is a power of revocation, and new appointment; for the new uses and estates created under the appointment, must necessarily (as to the extent of such appointment) revoke, defeat, or abridge the uses, which existed, and were executed, previously to the new limitation°. Sometimes an express power of revocation is limited prior to the power of appointing new uses. But this is never necessary.

Powers of appointment.

Powers of appointment are adopted under various circumstances, and they may either by the express provision of the deed precede, or be reserved after, the limitation of uses intended to be executed subject to such powers. Thus an estate may be conveyed to J. S. and his heirs, to such uses as A. shall appoint, and in default of appointment, and subject thereto, to the use of A. and his heirs. But it is

• See 2 Vern. 511. Moor, 611.

immaterial^p, whether the power actually pre-
cedes, or comes after, the limitation of the use
to A. and his heirs. In a case^q where an estate
was limited to the use of H. R. and his heirs,
and to such uses as he should appoint by will,
lord Hardwicke thought, that the word *and*
must be understood disjunctively for the word
or, in order to comply with the intention of
the parties. But if a feoffment, or lease and
release, be made to J. S. and his heirs, to the
use of J. S. and his heirs, with a power of re-
vocation reserved thereupon, such power is
void; because J. S. is in by the common law^r.

§ 507. V.

Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

(157.)

In conveyances to purchasers, the estate is
sometimes conveyed to the purchaser and his
heirs, to such uses as he shall appoint by deed
or will, and in default of, and subject to, such
appointment, to the use of the purchaser and
his heirs. It is conceived, that a power of ap-
pointment so reserved cannot be exercised;
for, subject to the power, the purchaser is in
by the common law; and it does not appear
to me, that the reservation of the power be-
fore the limitation to the purchaser, can make
any difference between this and the case
stated by sir Edward Coke. A modern
writer^s, to whom the profession is in-
debted for several valuable works, seems to

Power reserved
upon a legal
estate at the
common law.

^p See 4 Term Rep. 181.^q Co. Litt. 237. a. Shep.^r Dobbins v. Bowman, 3 Atk. 408.

Touch. 525.

^s Sugd. on Pow. 117.

Sect. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

think, that in this case, in order to preserve the power, and to effectuate the intention of the parties, the releasee would be deemed to be in under the statute of uses. It would be difficult, however, to support that construction either upon principle or authority.

That upon a conveyance to A. and his heirs, to the use of him and his heirs, A. would take in the course of possession by the common law, and not by the statute of uses, is a point, I apprehend, settled beyond controversy. In *Gwam and Ward v. Roe*†, a reversion was conveyed by fine to the conuzee and his heirs, to the use of the conuzee and his heirs; and the conuzee brings debt against the lessee: and it was objected, that no attornment of the lessee was alledged, as it ought to have been, "because the plaintiff came in by the common law, and not by the statute of uses—*quod fuit concessum*."

In the case of *lord Altham v. the earl of Anglesey* (Gilb. Rep. in Ch. 17.), it is expressly stated, that if a fine be levied to a man and his heirs, to the use of him and his heirs, in this case he shall take by the common law, and not by way of use: and the same doctrine is stated in *Long v. Buckeridge*, 1 *Strange*, 111. and by *Bacon* 63.

† Salk. 90. ante 86, 87,

The seisin transferred to the grantee being clothed with the limitation of the use, there was no ulterior equitable interest known previously to the statute of uses: for the conveyance to the grantee gave the possession to him at the common law, and the declaration of the use to him invested him with the most extensive beneficial interest then existing.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

The question therefore is, whether a power of revocation and new appointment can operate upon a legal estate perfected at the common law? The authority of sir Edward Coke is decisive: "In case of a feoffment or other conveyance, whereby the feoffee or grantee is *in* by the common law, such a proviso were merely repugnant and void." The author of the *Touchstone*, by way of illustration of the case stated by Coke, says, "As where A. doth enfeoff B. and his heirs, to the use of B. and his heirs:" but the writer, to whom I have alluded, seems to think, that Coke had no such case in contemplation; but alluded to a feoffment at common law, and not by way of use. If there be any meaning at all in the observation, he could have contemplated no other case. If a feoffment be made to A. and his heirs, it is necessary, in order that he may obtain the

* Co. Litt. 237. a.

* 525.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

legal estate at the common law, that there should be either a declaration of the use to him, or a consideration paid by him to prevent a resulting use to the grantor; so that although a grantee may still have a legal estate at the common law, the rule is grounded upon the practice and construction of uses; and it is to be presumed, that sir Edward Coke, who, in the case stated, was explaining the operation of the statute of uses, understood the principles, upon which a legal estate was created at the common law.

It is however contended, that the grantee having the use partially limited to him, may, in some cases, take the legal estate by the statute, and not at the common law; that this construction is adopted to give effect to the intention of the parties; and that the principle of construction may be extended to the case under consideration. If indeed intention is to be allowed at all upon the construction of a deed, it must be confined to those cases where the grantee to uses takes only a joint or partial estate under the limitation, the remaining use being limited to a third person; for in these cases, the use being limited to a certain extent to a third person, the words of the statute are satisfied; and courts of justice may possibly, in such cases, think it proper to mould the whole limitation under the statute,

meet the intention of the parties. SECT. V.

a conveyance be made to A. and his heirs, to the use of him and his heirs, it can never be a question of intention, whether A. takes a legal estate by the statute, or at common law. He takes it at the common law by a positive rule of law, not raised from intention, but operating sometimes even against it, as in the case of a conveyance unto, and *to the use of*, A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs; in which the intention of the grantor would be manifest, that B. should take the legal estate, for otherwise he could not be a trustee for C.; yet clearly the legal estate would vest in A.; and it would, no doubt, be the same, notwithstanding the grantor had by a subsequent declaration expressed his intention, that B. should take the legal estate. In truth, this and the case stated by sir Edward Coke, appear to me to be grounded upon the same established rule; that a use cannot be limited to arise out of the estate of a cestuique use, taking the legal estate at the common law; that a use cannot be limited upon a use, although the first use, being limited to the grantee, is not a use within the statute^v; and the two cases cannot in principle be distinguished. In the one case, the estate is conveyed to, and to the

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

^v See this point before stated, 86, 87.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

use of, A. and his heirs, to the use of B. and his heirs, and in the other to and to the use of A. and his heirs, subject to a power of appointment reserved to B.; and if in the case first mentioned, the use to B. cannot be executed in consequence of the seisin of A., being clothed with the use limited to him, upon what principle can the appointee of B. in the second, take a legal estate? Upon what rational distinction can the appointee acquire a legal estate under the limitation, effected by the exercise of the power, when, if the same limitation had been included in the deed itself, he would merely have taken an equitable interest?

I anticipate an observation upon this mode of reasoning. It may be said, that if a conveyance be made unto (not to the use of) A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs, although the use to C. being limited by the same conveyance, cannot be executed by the statute, because it is limited to arise out of the estate of *cestuique use*, yet by the exercise of a power of appointment reserved by the conveyance, the appointee may take a legal estate. The rule of law would be correctly stated; but the application of it to the case, which I have mentioned, would be erroneous; for by the exercise of the power, the use would arise out of

the seisin of A., not previously clothed with a use. The analogy would be preserved by stating the case thus: If in a conveyance to A. and his heirs, to the use of B. and his heirs, a power of appointment is reserved either to A. or B., but so worded, that the use to take effect under the exercise of the power is to arise out of the legal estate of B., and not out of the seisin of A., the appointee under the power would not take a legal estate, because the use limited to him would arise out of the estate of B. the *cestui-que use*. What difference can be discovered between the limitation of a use under a power to arise from the estate of cestuique use having the legal estate by the statute, and from the estate of cestuique use having the legal estate at the common law?

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

In most modern marriage-settlements, (158.) powers of selling and exchanging are limited to the releasees; and powers of leasing², jointuring³, and limiting terms for raising portions for younger children⁴, are reserved to the tenants for lives. All these powers, by whatever words they are created, take effect by way of limitation of use out of the original seisin of the feoffees, or releasees.

² See the form, Appendix III.

³ Appendix IV.

⁴ Appendix V.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(159.)

Powers of leasing were frequent soon after the statute of uses. In a case, 42 Eliz. ^a, a power of leasing is mentioned as a common thing; and it is there said, that the words usual in such powers were *to make leases or demise for 21 years, or three lives*; which words should be understood to limit the use; and that if a lease should be made in the words of a *demise*, it should enure as a limitation of the use for the term. It is observable, that the most early precedents of leasing powers enable the party to *lease or demise*^b; but the lease being nothing more than a limitation of the use, the words authorizing it should be, *limit and appoint* by way of lease or demise; and yet the old form of leasing powers is in this respect still preserved in the most approved modern precedents. I find, however, among Bridgeman's precedents, several powers of this kind, in which the words *limit and appoint* are expressly used^c.

Sir Edward Coke states^d, that powers of revocation in *voluntary* settlements were frequent in his time. Thus if a man seised in fee, for the advancement of his blood, covenanted to stand seised to the use of himself

^a Moor, 611. See Leaper v. Wroth, cited 6 Co. 33. a. Cro. Eliz. 5. 1 Leon. 35.

^b See West's Symb. s. 275. 1 Leon. 35.

^c See 2 Bridg. Conv. 12. 17. 98. &c. So also as to powers of jointuring, *ibid.* 14. 17. &c.

^d Co. Litt. 237. a.

for life, with remainder over, he would annex a power of revoking those uses. These powers, however, when reserved to the grantors or owners of estates; were, like the voluntary conveyances, in which they were reserved, made fraudulent, as against purchasers, by the 27th Eliz. c. 4°. General powers, there-

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(160.)

“ And be it further enacted by the authority aforesaid, that if any person or persons have heretofore, sithence the beginning of the queen’s majesty’s reign, that now is, made, or hereafter shall make, any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, or hereditaments, with any clause, provision, article, or condition of revocation, determination, or alteration at his or their will or pleasure of such conveyance, assurance, grants, limitations of uses or estates of, in, or out of the said lands, tenements, or hereditaments, or of, in, or out of any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift; (2.) and after such conveyance, grant, gift, demise, charge, limitation of uses, or assurance, so made or had, shall or do bargain, sell, demise, grant, convey, or charge

“ the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration paid or given (the first conveyance, assurance, gift, grant, demise, charge, or limitation, not by him or them revoked, made void, or altered according to the power and authority reserved or expressed unto him or them in and by the said secret conveyance, assurance, gift, or grant); (3.) that then the said former conveyance, assurance, gift, demise, and grant, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed, demised, or charged against the said bargainees, vandeers, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and against all and every person and persons which have, shall, or may lawfully claim any thing, by, from, or under

Sect. V.
Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

fore, of this kind, have been long since dis-
used in settlements, because, even when re-
strained by the consent of trustees, it has been
doubted, whether they are not within the
provision of that statute^f. A power was then
introduced into settlements, whereby the
prior uses were revoked, in case the grantor
should *first* settle other lands of equal value
to the same uses. This power, as Mr. Booth
observes^g, was found inconvenient, because
few people are in circumstances to buy new
estates, till they have sold their old ones. The
modern power of selling and exchanging,
which is reserved to the releasees, answers
every purpose^h.

**Priority of
powers.**

So early as the time of Bridgeman's prac-
tice, a doubt seems to have prevailed as to the
priority and effect of powers of the above
kind with reference to each other, when con-
tained in the same settlement; and he there-
fore introduced a clauseⁱ in settlements, de-
claring, "that every of the said jointures,
"leases, grants, limitations, and estates, shall
"take effect and stand good, according as the
"said jointures, leases, grants, limitations, and

"them or any of them,
"shall be deemed, taken,
"and adjudged to be void,
"frustrate, and of none ef-
"fect by virtue and force of
"this present act." See
Shep. Touch. 64.

^f See 2 Bac. Ab. 607. and

Buller v. Waterhouse, T.
Jones, 94. 3 Co. 82. b.

^g See opinion at the end
of Hill, Shep. Touch.

^h See Appendix VI.

ⁱ 1 Bridg. Conv. 219. See
2 Bridg. Conv. 18. 102.

"estates shall in priority of time be made, one before the other, by force of any of the powers or provisoes aforesaid." The qualification, however, so far as I have been able to ascertain, appears to have been subsequently omitted in most approved forms; thereby leaving the effect of the powers to the construction of law; but of late years, it has not been unusual to insert a proviso, declaring; 1st, that the power of leasing shall take precedence of the power of selling and exchanging, unless executed subsequently to it, in point of time; 2dly, that the power of selling and exchanging shall overreach every other power, although subsequently exercised in point of time; and 3dly, that in all other cases, the powers shall take effect according to the exercise of them in priority of time.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Considering the nature and objects of powers of leasing, jointuring, charging for younger children's portions, and selling and exchanging, I cannot satisfactorily discover the necessity or propriety of any explanatory declaration as to their priority: and it is to be feared, that these clauses have tended to create doubts, where none ought to have existed, and even to raise an erroneous opinion as to the effect of appointments made under the powers; for certainly it cannot be considered as an invariable rule, that, in the absence of an express declaration, the uses to

SECT. V. fore, c

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

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The powers of jointuring and charging for younger children's portions are introduced with a view to benefit the immediate objects of the settlement by making a provision for those claiming under them as wives, or children. By the exercise of the power of leasing, or of selling and exchanging, the use is limited to a purchaser, who is not an immediate object of the settlement. The uses limited under the exercise of the former powers must be considered as limitations originally contained in the settlement for the benefit of the objects of it; but the estates created by the latter must necessarily, as to the extent of such estates, overreach the limitations of, and virtually supersede, the settlement itself.

The avowed object of a power of selling is to enable the donor of it to convey to a purchaser a title complete against the immediate objects of the settlement, and those claiming under them either as volunteers, or upon the consideration of marriage.

If a sale or exchange, made under the execution of a power, revokes a jointure or provision for younger children, made by the set-

tlement itself, it must, for the same reason, overreach a jointure or provision, created by the exercise of a power contained in such settlement. There is no rational distinction between the cases. In each, the jointure or charge will be secured upon the estate to be purchased or acquired in lieu of the estate sold or exchanged. Then with reference to the powers in each of the two classes above mentioned: first, when powers are reserved to a tenant for life, of leasing, selling, and exchanging, and of charging, not as a provision for younger children, but for raising a sum of money for his own use, the use or estate appointed by either of these powers, would vest in the appointee in possession; and no subsequent act of the tenant for life could defeat his own previous appointment in favour of a purchaser. If the subsequent, could defeat the previous, appointment, the appointee under the previous appointment would not take an estate in possession, according to the express purport of the appointment^k. Secondly, if powers of jointuring and charging for younger children's portions, are reserved to a tenant for life, the priority of the execution of the uses under those powers, should be determined by the usage in limiting those estates by the settlement itself, by which the presumed objects of the parties may be in-

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

^k See *Goodright v. Cator*, Doug. 477.

SECT. V.

Of limitations
of uses, and cre-
ation of legal
estates by the
statute, which
differ from the
rules of the
common law.

ferred; and therefore a jointure under a power, should precede a charge made by the same tenant for life for younger children's portions, notwithstanding the latter may be executed previously in point of time; and although the jointure be made upon a second, and the charge created upon a first marriage.

Admitting the propriety of expressly declaring the intention of the parties, both of the qualifications, which I have above noticed, are imperfect and erroneous. The following plan seems less objectionable: in the power of sale, the releasees, or the tenant for life, may be empowered to revoke the uses limited by the settlement, and which may be limited by the exercise of any of the powers therein contained, except any lease made under the power of leasing, and subject and without prejudice to any sale or mortgage, which shall then have been actually made in consequence of the exercise of any of the powers; and in the power authorizing the tenant for life to charge for younger children's portions, it should be expressly stated, that the charge made under the power should be subject to the jointure limited by virtue of the power of jointuring reserved to the same tenant.

Powers of the nature before described are either, first, simply collateral to the land; or, secondly, relating to the land.

First. Powers, when reserved to mere strangers, or to grantees, having only a seisin to uses, and no legal estate, are called collateral; and a collateral power, vested in persons, not being grantees to uses, cannot be released, nor extinguished, either by the persons to whom such power is reserved, or by the persons claiming the estate, subject to it. Therefore, if a feoffment be made in fee by A. to uses, with a proviso, that if B. (a stranger) shall revoke, the uses shall cease; B. cannot release this power; and a fine levied, or feoffment made by him, will not extinguish it¹; because, as the person to be benefited under the revocation does not claim the estate from, or under, B., but is in under the original settler, so he is not barred by his act. So in the case of *Willis v. Shorral*^m, lord Hardwicke held, that a power, vested in a stranger to limit a term of years for raising a sum of money upon a certain event, could not be destroyed by a fine levied by the person, who claimed the lands subject to the power.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law. (161.)

(162.)

But when a collateral power, as a power of selling and exchanging, is reserved to the releasees or grantees to uses, there is supposed to be a *scintilla juris*, or possibility of seisin, remaining in them to serve the use arising

¹ Cited in Digge's case, 170. Moor, 605.
¹ Co. 174. a. See Albany's case, *ibid.* 111. a. 1 P. W. ^m 1 Atk. 474.

Sect. V. under the execution of the power^a; and it should seem, that the power may be defeated by the previous release or extinguishment of this possibility of seisin. The destruction of this *scintilla juris* occasioned one of the objections to the title in *Wheate v. Hall*^o; for sir Martin Foulkes, to whom the legal estate was devised by the will of Maximilian Western jointly with Charles Callis Western, was surviving releasee to uses under the settlement of 1793, and he joined in conveying the legal estate to the uses of the settlement of 1805. In this case of *Wheate v. Hall*, it was determined, that a power of selling and exchanging introduced into a settlement with reference to the limitations in such settlement, cannot in equity, nor I apprehend at law, be exercised with a view of defeating a new set of limitations in a subsequent settlement.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

Secondly. Powers relating to the land are either *appendant*, or *in gross*.

Powers *appendant*, are such, as upon their execution are to take effect during the continuance of the estate of the person, to whom such power is reserved. Of this kind are powers reserved to tenants for lives to make

^a Ante 104. 138. et seq. ^o 17 Ves. 80.

leases^p. With respect to these powers, any conveyance by the tenant for life, which wholly transfers his legal and beneficial interest, will entirely destroy them^q. But if a tenant for life convey his legal estate for life merely for the purpose of letting in a particular charge, this, it seems, will not destroy a power of leasing previously reserved to him^r.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

If an estate be limited to the use of A. for life, with many remainders over to other persons, and with a power of revocation and new appointment reserved to A., as to the whole fee, this power may be called appendant, because it comes within the compass of A.'s estate for life. Therefore, if A. by lease and release, or bargain and sale, convey his life estate absolutely to B., this suspends the power as to the remainder of the fee^s. But if he make a lease for years^t, though that lease be tantamount in duration to a conveyance of the whole freehold^u, such lease, it seems, cannot suspend, nor destroy, the power.

(163.)

^p Hard. 415.^q Ibid.

^r Ren, lessee of Hall, v. Bulkeley, Dougl. Rep. 292. 2d edition. The authority of this case, however, has been doubted. See Sugd. Powers, 59.

^s See 2 Roll. Ab. 263. pl. 2. and also Sugd. on Powers, 63.

^t Snape v. Turton, W. Jones, 392. 2 Roll. Ab. 263.

^u Goodright v. Cator, Dougl. 477. 2d edition.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

So the usual power of appointment, limited to a purchaser to prevent the dower of his wife from attaching upon the estate, must be considered as a power appendant. And therefore, if the purchaser afterwards convey the fee by lease and release, fine, or any other conveyance, without having had recourse to the power, the power is thereby extinguished.

(164.)

A power *in gross* is reserved to a person, who has an estate in the land, but the estate, to be created under the power, is not to commence until the determination of the estate of such person. Thus, if there be tenant for life, with a power to make a jointure on an aftertaken wife, or to make a lease for years, to commence after his death, to raise portions for daughters; these are powers *in gross*^w. These powers, says lord Hale^x, “ may by apt words be destroyed by *release*, or by a fine or feoffment^y, which carry away and include all things relating to the land: but “ an assignment of *totum statum suum*, or “ other alteration of the estate for life, does “ not affect such a power.” Therefore, if a tenant for life convey by lease and release, or bargain and sale *in fee*, he does not destroy a

^w See *Edwards v. Slater*, Hard. 410. 416.

^x *Ibid.* And see *Ferne v. Peacock*, Ca. Temp. Talb. 41.

^y So by *recovery*. Savile

v. Blacket, 1 P. W. 777. Note, the power in that case is erroneously called *collateral*; whereas, according to lord Hale's distinction, it was certainly *in gross*.

power in *gross*, reserved to him: for it is the nature of these conveyances to pass only, what the tenant might lawfully convey. But if tenant for life, having a power in *gross* reserved to him, exercises that power by *will*, and afterwards the remainder of the estate in fee becomes vested in him, the power is merged and extinguished by the accession of the fee^a.

SECT. V.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.

(165.)

Having explained the nature of powers in general, and the manner in which they may be destroyed or suspended, I shall defer the further consideration of them to a subsequent part of this work, when I shall examine the deed or instrument, by which powers are executed.

It is scarcely necessary in this place to repeat, that all future and shifting uses arise out of the estate of the feoffees, releasees, &c. and not out of the estate of cestuique use: for if a future use be limited out of the estate of the latter, it would in fact be the limitation of a use upon a use; which the law will not permit^a. It follows, that no springing use can be limited upon a bargain and sale: for the use cannot arise out of the estate of the bargainee, he being merely a cestuique use; nor

Of the seisin, whereout a shifting or future use must arise.

^a Cross v. Hudson, 3 Bro. 30.

^a 1 Co. 136. b. 137. a. Co. Litt. 271. b.

SECT. V. can it arise out of the original seisin of the bargainor; for after the bargain and sale, there can be no possibility of seisin remaining in him. But this I shall explain more fully hereafter. As to powers of leasing, they can neither be reserved upon a bargain and sale^b, nor upon a covenant to stand seised^c: for the consideration in the latter conveyance can only extend to the covenantee, and those of his blood, and not to a lessee. But general powers of revocation may be reserved upon a covenant to stand seised^d.

Of limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law.
(166.)

SECT. VI. VI. I have now explained the cases, in which the creation and limitation of estates by way of use since the statute, correspond with, and differ from, the ancient manner of limiting and creating estates at common law. I shall now proceed to point out the alterations produced by the statute of uses in the ancient laws relative to *remitter*.

Of the effect of the statute of uses upon the laws of remitter.

(167.) By the common law, if tenant in tail had enfeoffed his son in fee, which son at the time of the feoffment was within age, and the tenant in tail had died; the son, after the father's death, as heir in tail, would have been remitted to his former estate^e. But since the statute, if tenant in tail make a feoffment in

^b Poph. 81.

^c *Mildway v. Standish*,
Moor, 144.

^d See *Shep. Touch.* 524.

^e *Litt. sec.* 680.

fee to the use of his issue being within age, and to his heirs, and then die; and the right of the estate tail descend to the issue, being within age; the issue shall not be remitted; for the issue has the use in fee by the feoffment, and then the statute executes it in such manner and plight, as it was first limited. But in this case, if the issue waive the possession, and bring a formedon in the descender, and recover against the feoffees, he shall be remitted ^a.

Stat. VI.

Of the effect of the statute of uses upon the laws of remitter.

It was therefore said, that if an infant, or a woman, having right to lands discontinued, whereon entry was not lawful, came to such lands by way of use raised out of the estate, the first taker should not be remitted ^f. So in Amy Townsend's case ^g, where tenant in tail made a feoffment in fee to the use of his wife for life; remainder to his son and heir apparent in fee. The feoffor and his wife died; and it was determined, that the heir in tail was not remitted. However, though the first taker be not, as in the case of the issue put by Coke, yet it seems, that the issue of that issue, or the one in remainder after the first taker, shall be remitted ^h.

(168.)

^a Co. Litt. 348. b.
^f Hob. 255.

^g Dyer, 54. a. b. Hob.
255. Plowd. 111.
^h Co. Litt. 348. b.

SECT. VI.

Of the effect of
the statute of
uses upon the
laws of remitter.

(169.)

Amy Townsend's case was not affected by the statute 32 Hen. 8. That statute directs, that the fine or feoffment of the husband of the wife's land shall not operate as a discontinuance: and, therefore, as to the wife and those claiming under her, it has considerably lessened the effect of the statute of uses upon remitters. The case of *Duncombe v. Wingfield*¹ was in substance thus: A. and B. his wife, being seised in fee in right of B., levied a fine with proclamations to the use of themselves, and the heirs of their two bodies begotten, remainder to J. S. for life, remainder to W. in tail, remainder to B. (the wife) in fee; afterwards A. alone levied another fine with proclamations to the use of himself and wife in special tail as before, remainder to himself in tail, remainder to himself and E. M. in fee. B. died without issue, and then A. died. Upon this state of the case, three material points were settled. The first point was, that where husband and wife are tenants in special tail, and the husband discontinues by fine or feoffment, and takes back an estate in special tail to himself and wife, the wife is *ipso facto* remitted, and of course the husband; though it is true the husband is so far bound by his own act, that he cannot claim it in his own person. That in Amy Townsend's case the right of the wife was

¹ Hob. 254. Vide 8 Co. 71. b. Dyer, 191. b.

not within the saving of the statute of uses, and of course she was not remitted against the express words of that statute: but that the 32d Hen. 8. had changed the reason of that case; so that now, the use being raised to the wife out of the estate created by the fine, she is not in of an estate *discontinued*, but of an estate whereupon she might enter after her husband's death; and that a right of entry was sufficient to support her remitter, without an actual entry. That it was true the fine of the husband alone finally and totally barred the issues in tail, and therefore differed from a feoffment at the common law; yet the entail, which is barred as to the issue, remained, notwithstanding the fine, to the wife in right, as to herself, and to all estates and remainders depending upon it, and to all the consequences of benefit to herself, and to others by her, as long as she lived, as amply and beneficially, as if the fine had not been levied.—2d Point. As the husband and wife were both remitted to the first estate tail, of consequence J. S. and those in remainder expectant on that tail, were also remitted. But that upon the *death* of the *wife*, the remainders were dislodged, and turned into *rights*, as they were by the fine, and would have been, if the wife had not been remitted.—As to the 3d point, it was held, that after the death of the wife the remitter ceased, and the land returned again into the estate passed by the se-

SACT. VI.

Of the effect of
the statute of
uses upon the
laws of remitter.

(170.)

SECT. VI.
Of the effect of
the statute of
uses upon the
laws of remitter.

- (171.) cond fine; which estate continued during the life of the husband, and would continue as long as there was issue, if there had been any; for till then, those in remainder had no title to demand the land: but after the death of the husband and wife *without issue*, the entry of J. S. was lawful. In this case lord Hobart said, that if after the death of the wife the husband had properly suffered a recovery, he would have barred all the remainders depending upon any of the estates. He also held in another place, in the same argument, that if the wife had survived the husband, and had suffered a recovery, it would have barred the remainder depending upon the first estate tail; but so long as there was issue living between them, the premises would go according to the estate passed by the second fine.

It is agreed, that if, in the above case, the husband had made a *feoffment*, instead of levying a *fine*, it would not have *barred*, but only have *discontinued*, the right of the issue^k. Therefore, as the wife by her entry would have been remitted, so she would have purged the discontinuance, and restored the right of the issue, by restoring the discontinued estate tail. If too a tenant in tail make a *feoffment* to the use of himself *in fee*, or to the use of

^k 1 Lev. 49. 1 Sid. 63.

himself *for life*, remainder to B. for *years*, and does not dispose of the reversion; in either case, the issue, it seems, is remitted, though the tenant in tail himself is not¹.

SECT. VI.
Of the effect of
the statute of
uses upon the
laws of remitter.
(172.)

VII. I have before observed, that uses in their commencement were of a secret nature, depending merely upon a parol agreement or declaration between the feoffee and cestuique use. But in process of time it was found necessary to make some certain declaration of the use, indicative of the intention of the parties: and this declaration of the use must now by the statute 29 Car 2. c. 3. be in writing^m.

SECT. VII.
Of declarations
of uses.

The conveyances by bargain and sale, and covenant to stand seised, are in fact nothing more than declarations of uses; for the use being served out of the seisin of the bargainor and covenantor in those conveyances, they merely serve to declare the use to the bargainee and covenantee. But upon such conveyances as operate by way of transmutation of possession, the use may be declared by a deed or writing distinct from the conveyance,

(173.)

¹ 1 Roll. Rep. 260. Moor, 846. pl. 1143. B. N. C. 215. 8 Co. 72. a. Lane, 93 to 96.

^m See Holt's Rep. 736. By the 7th section of the above act it is enacted, "that from and after the 24th day of June (1677), all declarations or creations of trusts or confidences of

"any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

Sect. VII. by which the possession is transferred. Indeed, upon the conveyances by feoffment and lease and release, it is now universally the practice to declare the use in the same deed immediately after the habendum. But in respect to fines and recoveries, the uses are declared either by deed *precedent* or *subsequent* to the levying of the former, or suffering the latter. After the statute 27 H. 8. c. 10. it became questionable, whether if a recovery were suffered or fine levied, without any previous declaration of the uses, any subsequent deed could direct them^a. For it was thought, that upon suffering the recovery or levying the fine, the use resulted to the recoveree or conuzor, which resulting use the statute immediately executed: so that the use being once vested and executed by the statute, it could not be divested by any subsequent declaration. However, in Dowman's case^b it was determined, that although the use resulted to the recoveree or conuzor until the subsequent declaration, yet, when that was made, the use was immediately executed according to the declaration. Soon after the statute 29 Car. 2. c. 3., which directs that all creations and declarations of uses shall be in writing, it again

(174.)

^a 9 Co. 7. b. 28 Eliz. See Bessett's case, Dyer, 126. a. In Dowman's case a recovery was suffered in Hilary Term, 15 Eliz. The original writ was dated the

20th Jan. 15 Eliz., returnable the 22d Jan. Seisin was delivered 4th Feb. (Moor, 191.) The deed declaring the uses of the recovery was dated the 1st Feb. 15 Eliz.

became a doubt, whether resulting uses upon fines and recoveries were not so executed as to exclude any *subsequent deed*: for it was supposed, that the statute required the use to be declared either previously to, or at the time of, levying such fines and recoveries. Therefore by the statute 4 Anne, c. 16. s. 15. declarations of the uses of fines and recoveries manifested by any deed, made by the party, *after* the levying of such fines or suffering such recoveries, shall be as effectual as if the 29 Car. 2. c. 3. had not been made^r. This statute only mentions fines and recoveries; and therefore the same doubt, if it was well founded, still remains as to the conveyance by feoffment.

Sacr. VII.

Of declarations of uses.

I shall now consider, First, Who may declare uses—Secondly, In what cases one de-

* See Gilb. Uses, 62.

“ And whereas it hath been doubted, whether since the making of the said last mentioned act of parliament (29 Car. 2. c. 3.), the declarations of uses, trusts, or confidences, of any fines or common recoveries manifested by *deed* made after the levying or suffering of such fines or recoveries are good and effectual in law; it is hereby declared, that all declarations or creation of uses, trusts, or confidences of any fines, or common recoveries of any lands, tenements, or

“ hereditaments manifested and proved, or which hereafter shall be manifested and proved by any deed already made, or hereafter to be made, by the party who is by law enabled to declare such uses of trusts, after the levying or suffering of any such fines or recoveries, are and shall be good and effectual in the law, as if the said last mentioned act had not been made.”
See Bushell v. Burland, Holt’s Rep. 789. where the declaration of uses was *four* years after the fine had been levied.

SECT. VII. declaration of the use shall be controuled or annulled by a subsequent declaration—Thirdly, Where the same instrument contains two contradictory declarations—Fourthly, The general construction upon, and effect of, the declaration of uses.

(175.)

Who may declare uses.

First. Who may declare or limit the use.

The king.

The king may declare uses upon his letters patent, though indeed the patent of itself implies a use[†]. But if the king grant lands to J. S. and his heirs by his letters patent, to the use of J. S. *for life*; here J. S. has only an estate for life, and the king has the inheritance without any office found: for implication out of matter of record ever amounts to matter of record. The queen may also declare uses[‡].

The queen.

Idiot.

An idiot, or person of non-sane memory, may declare uses upon a fine or recovery; which declaration of uses will continue valid as long as the conveyance, upon which the uses are declared, remains of force[§]. It is the same with respect to an infant. Therefore if an infant levy a fine, or suffer a reco-

Infants.

(176.)

[†] Bac. Uses, 66.

[‡] Ibid.

[§] Mansfield's case, 12 Co. 124. Lewing's case, cited 10 Co. 42. b. But see 4

Leon. 89. and sir Butler Wentworth's case, cited 2 Ves. 403. 3 Atk. 313. 15 Vin. 305. pl. 3. and note (M. a.)

very, and limit the use thereupon, he cannot avoid the declaration of the use, without avoiding also the fine or recovery¹: for as the matter of record stands, the law supposes, that the conuzor or recoverer was of full age; and the deed to declare the uses, being part of the fine or recovery, shall stand likewise. But a covenant by an infant in consideration of marriage or blood to stand seised to an use, is void².

SECT. VII.

Of declarations
of uses.

In a case, where A. tenant for life, and B. his eldest son, an infant, tenant in tail in remainder, entered into marriage-articles, by which A. alone covenanted within a year after his son should come of age, that he and his son would by fine or recovery convey the settled estate to certain uses; and both A. and B. sealed the deed, and within the time specified joined in a fine and recovery, it was determined, that the mere consent of B., by his sealing the deed, was not a sufficient declaration by him of the use of the fine and recovery³. But in *Slocombe v. Glubb*⁴, where, upon the marriage of a male infant and an adult female, the intended wife conveyed her real estate to certain uses, and both the intended husband and wife enter into a cove-

¹ Bac. Uses, 67. 2 Co. 58. a. 10 Co. 42. b. 3 Atk. 710. Moor, 22. pl. 78. 13 Vin. 304. pl. 1.

² Bac. Uses, 67.

³ *Nightingale v. Ferrers*, 3 P. W. 207.

⁴ 2 Bro. Cha. Ca. 545. b. 1 Ves. J. 28.

Sect. VII. **Of declarations of uses.** nant within one month after the infant arrived at the age of twenty-one years to suffer a recovery of the infant's estate to the uses declared of the wife's estate: the question arose upon a bill by the trustees to have a specific performance of the infant's covenant, whether he was bound? Lord Thurlow said, that it was not necessary to determine how far the infant husband could be bound by his own contract: for the wife, being adult, had also entered into the covenant; and the husband must answer her contract^a.

Baron and
feme.

(177.) It seems, that a feme covert cannot, without the consent of her baron, create or limit the use of her lands^b. But if *baron* and *feme* levy a fine, or suffer a recovery, of lands, of which they are seised in right of the feme, though they ought regularly to join in the declaration of the uses of such fine or recovery, yet if the husband in such case alone declare the uses, his declaration will bind the feme (although an infant^c), if she do not dissent to it^d: for as she joined with her hus-

^a How far the *real* estates of *female* infants can be bound by marriage-contracts, see Cannell v. Buckle, 2 P. W. 243. Harvey v. Ashley, 3 Atk. 607. Durnford v. Lane, 1 Bro. Cha. Ca. 106. Caruthers v. Caruthers, 4 Bro. Cha. Ca. 500. Clough v. Clough, 3 Woodson, 453. note. 5 Ves. 710.

^b See Johnson v. Cotton, Skin. 275. And. 164. pl. 209. in case of Colgate v. Blythe. ^c 2 Roll. Ab. 798. 22 Vin. 232. pl. 2.

^d Beckwith's case, 2 Co. 57. a. Moor, 197. Anon. Moor, 22. pl. 73. Lusher v. Banbong, Dy. 290. a. See the cases collected in note to ph 1. 22 Vin. 232. T.

band in the fine or recovery, the presumption is, if the contrary cannot appear, that she agreed with him in the declaration of the uses. Indeed, if she acquiesce for any length of time after her husband's death in the declaration of uses made by him, she cannot afterwards invalidate the fine or recovery^a. As the conveyances by feoffment and lease and release do not bind the feme, although she be a party, any declaration by her and her husband of the uses, raised upon those conveyances, shall be void as to her^f. But if husband and wife bargain and sell lands for money, and afterwards levy a fine to the bargainee, the bargain and sale is considered merely as the declaration of the use of the fine, and as such will bind the wife^g. If in declaring the uses of a fine levied, or recovery suffered, of lands, held in right of the wife, the husband and wife make separate declarations of the uses, neither of them can stand, and then it will be the same, as if no declaration were made; in which case the use will result, and return to its former course, viz. to the feme and her heirs^h. But with respect to baron and feme, we must distinguish between a limitation of the use of part of the estate in the land, and the limitation of the

SACT. VII.

Of declarations
of uses.

(178.)

^a *Swanton v. Raven*, 3 pl. 73. See the cases in Atk. 106. note to pl. 4. 22 Vin. 232.

^f *Gilb. Uses*, 244.

^h *Moor*, 197. pl. 347. See

^g 2 Co. 57. a. *Moor*, 22. note to pl. 6. 22 Vin. 232.

Sect. VII.
Of declarations
of uses.

use of part of the land itself. This distinction was taken in Beckwith's case¹. Thus, if husband and wife differ in the limitation of the particular use, but concur in the limitation of the uses in remainder, yet the whole of the uses are void. But if they agree in limiting the use of part of the land itself, and vary in the declaration of the use of the residue, the declaration shall be good for the part they agreed in, and void for the remainder.

Where a husband seised of the fee-simple of an estate, to which the dower of his wife attaches, conveys to a purchaser, and enters into a covenant, that he and his wife will in a subsequent term levy a fine to the purchaser, it is not absolutely necessary, that the wife should join in the declaration of the uses of the fine²; for in this case the fine operates, so far as concerns the wife, as an extinguishment of her right to dower; and there can be no resulting use upon a conveyance operating as the release of a right³, and not as the transfer of an estate.

Tenant for life,
and remainder-
man.

So if tenant for life and remainder-man levy a fine, or suffer a recovery, and the te-

¹ 2 Co. 56. b. 58. a. 22
Vin. 233. pl. 6, 7. and notes
in the margin.

² See Haverington's case,
Owen, 6. 2 Bac. Ab. 140.

and Eare v. Snow, Plowd.
514.

³ 13 Co. 55. Note to pl.
1. 22 Vin. 209. (O. 3.)

nant for life alone declare the uses, this declaration shall not affect the remainder-man^m. And it should seem, that if the remainder-man seal, and be a party to, the deed, in which the tenant for life alone covenants to suffer a recovery, &c. to certain uses, this does not bind the remainder-man, though he afterwards should join in suffering the recovery, &c.ⁿ Joint-tenants may each declare different uses of their respective shares^o.

Sect. VII.
Of declarations
of uses.
(179.)

Joint-tenants.

Secondly. In what cases a previous limitation of the use shall be controuled by a subsequent declaration by a distinct instrument.

In what cases
the first declaration
shall be
controuled by
the subsequent.

I have before had occasion to remark, that in a conveyance by *deed*, transferring the seisin to a grantee, such as a feoffment or lease and release, the use is declared by the conveyance; and it scarcely ever occurs in practice, that the use is, in that case, declared by an instrument, distinct from the deed conveying the seisin. Where the conveyance is by bargain and sale, or covenant to stand seised to uses, the conveyance itself is the declaration of the use.

^m See *Roe v. Popham*, Dougl. 25. *Argol v. Cheney*, 22 Vin. (T. 6.) 236. pl. 1. and note in the margin.

ⁿ Per Master of the Rolls in *Nightingale v. Ferrers*, 3

P. W. 206. But note, in that case the person in remainder was an *infant*; therefore *quære*.

^o 2 Co. 58. a. 22 Vin. 236. pl. 1.

Sect. VII.
Of declarations
of uses.
(180.)

But when the assurance, transferring the seisin to serve the uses, is by fine or recovery, the uses are limited by deed executed either before, or after, the levying the fine, or suffering the recovery. If before, the deed is said to *lead*, and, if after, to *declare* the uses of the fine or recovery. It has happened, in the case of fines and recoveries, that there have been contradictory limitations of the uses: and from this circumstance several intricate and perplexing points have arisen.

If there be a deed leading the uses of a fine or recovery, those uses may be altered, varied, or absolutely revoked previously to the levying the fine or suffering the recovery. When the fine or recovery is conformable in time, persons, and other circumstances, with the deed leading the uses of it, then the variation, alteration, or revocation of the uses may be effected;

First, By a deed or other instrument of as high nature, as the preceding deed or instrument; for, *nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine, quo ligatum est*: but in this case a deed leading the uses of a fine or recovery cannot be varied by a mere writing without seal².

² Countess of Rutland's case, 5 Co. 26. a.

Secondly, By the mutual consent of all parties concerned in interest.

Sect. VII.

Of declarations
of uses.

The author of the Touchstone (519.) has adopted the rule, " When the agreement for the limitation of uses is precedent, whether it be by writing or word (it must be now in writing by the statute of frauds), it is but *directory*, and doth not bind the estate, until the same assurance be afterwards had; and therefore by a new agreement, or declaration made, in the same manner as the former, that is to say, in writing, if the former be so, and *between the same parties*, either before or at the time of the same assurance passed, new uses may be made, and the former uses changed."

By a deed dated on the 21st of August 1661, Philip Stapilton was tenant for 99 years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they by deeds of lease and release, dated the 9th and 10th of Sept. 1724, release and confirm to Thompson and Fairfax all those manors, &c. to hold to them, their heirs and as-

Sacr. VII.
Of declarations
of uses.

signs, to the use (as to part) of Philip the father, his heirs and assigns for ever, and as to another part, to the use of Philip the father for life, remainder to Henry the son for life, remainder to two trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father; and as to the remaining part, to the use of Philip the father for life, with the like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within twelve months, and likewise for further assurances. To this deed the heir at law of the surviving trustee in the deed of 1661, was not a party.

But by deeds of lease and release, dated the 28th and 29th of Sept. 1724, to which the heir of the surviving trustee of the deed of 1661, was a party, the father and two sons made Thompson and Fairfax tenants to the precipe, in order to suffer a recovery for the

purposes mentioned in the former deeds of the 9th and 10th Sept.

SECT. VII.
Of declarations
of uses.

Before any recovery suffered, Henry died, leaving issue the plaintiff.

Afterwards, by lease and release, dated the 12th and 13th of April 1725 (to which the heir of the surviving trustee of the deed of 1661, was a party), Philip the father, and Philip the son, covenant to suffer a recovery, in which Thompson and Fairfax were to be tenants to the precipe, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity Term, 1725, a recovery was suffered, in which were the same tenants to the precipe, the same demandant, and the same vouchees (except Henry who was dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

Lord Hardwicke stated the first question to be, whether the lease and release of the 9th and 10th of Sept. 1724, would amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April 1725.

Sect. VII.
Of declarations
of uses.

His Lordship observed, that as uses must arise out of the agreement of the parties, the parties may change the uses; but that must be done by the mutual consent of all the parties concerned in interest. "But in the present case, the second agreement not being between all the parties concerned in interest, ought not to controul the first declaration; and especially as this recovery was suffered within the time prescribed by the first deed, and between the same demandant and tenant. The consideration for suffering the recovery was good, both in law and equity; and there is no case to warrant me to say, the first agreement is not good and binding, or that the tenant in tail could by his own agreement afterwards change the uses."

His Lordship added, that if it was doubtful, whether the recovery suffered in 1725, should enure to the uses declared by the deed of 1724, he was of opinion, the recovery would operate to make good those estates which passed by the deed of 1724.

This is upon the principle of *Cheney v. Hall*, Amb. 526. (1766), *Moody v. Moody*, ibid. 649. (1767), and *Goodright v. Mead*, 3 Burr. 1703.

Cheney v. Hall.
1703. Conveyance by G.W., the father,

To the use of himself for life, with remainder as to part,
To the use of his wife for life, remainder as to the whole,
To the use of the first and other sons of the marriage.

But when there is a deed leading the uses of a fine or recovery to be subsequently levied or suffered, and the fine or recovery varies from the preceding deed in time, persons, or other circumstance, then the uses of the first deed may, previously to the fine or recovery, be varied by another instrument, although such subsequent instrument be not a deed, but merely a writing without seal^s; and al-

STAT. VII.

Of declarations of uses.

1733. Conveyance by lease and release upon the marriage of G. W. the eldest son of the marriage,

To the use of himself for life,

To the use of his intended wife for life,

To the use of the heirs of the body of the wife,

His own right heirs.

1746. G. W. the father, and son, suffer a recovery and declare the use, To a mortgagee in fee, And subject thereto, The father for life, Son in fee.

Lord Northington thought, that the common recovery enured to the uses of the settlement 1733.

Moody v. Moody.

E. M. Tenant in tail in the year 1709 conveys

To the use of himself and intended wife for their lives,

Heirs of their bodies, Himself in fee.

Covenant to do further

acts by fine or recovery.— Recovery afterwards suffered by E. M.

Lord Camden held, that the recovery barred the entail, of which he (E. M.) was seized before the settlement, and operated as a confirmation of the settlement.

Goodright dem. Tyrrel v. Mead.

J. S. tenant in tail with the immediate reversion, 24th, 25th Oct. 1742, in consideration of an intended marriage, conveys to trustees, To the use of himself for life with remainders over.

1761. Recovery by J. S. to the use of L. in fee, in trust to sell, and pay debts, &c.

1763. Conveyance by L. the trustee to the use of a purchaser in fee.

The court unanimously of opinion, that the recovery enured to the uses of the settlement.

* *Jones v. Morley*, 3 Salk.

677. 9 Will. 3. The abstract of this case is thus;—

SECT. VII. though all the persons interested under the first declaration are not parties to the second^a: and indeed the uses of the first deed may, *after* levying the fine or suffering the recovery, be varied^b; but in this case, if the doubt suggested by the statute 4 Anne, c. 16.

Of declarations
of uses.

29 Jan. 1665 (Hilary Term).
Deed of covenant to levy a fine in the then next Hilary Term (1666).

31 Jan. 1665.

Agreement, not being a deed, between the same parties, that the uses of the deed of the 29th Jan. 1665, should be revoked.

The fine was levied in Hilary Term, 1665, and not in Hilary Term, 1666; and consequently there was a variance.—The first deed was revoked.

^a Countess of Rutland's case, 5 Co. 25. b. 2 Jac. 1.

The abstract of this case is as follows;

10 March, 21 Car.

Voluntary settlement after marriage between,

1. Edward earl of Rutland,

2. Sir Gilbert Gerrard, and Thomas Holecroft,

by which the earl covenants, before the end of Trinity Term then next, by fine, or other conveyance, to assure the manor, &c.

To the use of,
The earl and the countess his wife
for their lives,
The heirs of the earl,

29 March, 21 Car.

Voluntary deed between,

1. Edward earl of Rutland,

2. Lord Burghley, sir Gilbert Gerrard,
and others,

by which the earl covenants to convey the same manor before the feast of the Annunciation then next,

To the use of
The earl in tail male,
remainders over.

No fine levied in Trinity Term.

17 Sept. following. A fine was levied by the earl to sir Gilbert Gerrard, and Thomas Holecroft;
at the same time, the earl levied another fine to lord Burghley and the parties to the 2d deed.

The uses of the first deed revoked.

^b Jones v. Morley, *supra*, Shep. T. 520.

s. 15. be sufficiently grounded^{*}, the subsequent variation of the uses must be by deed, and not merely by writing without seal.

SECT. VII.

Of declarations of uses.

When the fine or recovery does not vary in circumstances from the deed leading the uses of it, the use is executed and fixed upon the levying the fine, or suffering the recovery: and no subsequent declaration is admitted to controul the operation of the previous deed or instrument^z.

Although the fine or recovery does not altogether correspond in circumstances with the deed or instrument leading the uses of it, if there be no subsequent declaration of the uses, the fine or recovery shall still enure to the uses of the leading deed or instrument^y.

If there be no preceding limitation of the use, the uses of the fine or recovery may be subsequently declared according to the statute of 4 Ann. c. 16. s. 15. by deed; but it is by no means certain, that such subsequent declaration may not be controuled by another

^{*} See Mr. Sugden's note, Gilb. Uses, 111.

^z Shep. T. 520. Salk. 676. Tregame v. Fletcher, 9 Co. 10. b. 11. a. Comb. 429. 1 Atk. 9.

^y Shep. T. 520. 2 Co. 76. a. Havergill v. Hare, 2 Roll. Ab. 799. 1 Atk. 7. 13 Vin. 306. pl. 2. P. a. 2. and the cases collected in the note.

Sect. VII.
Of declarations
of uses.

averment by deed, although there be no variance in the fine or recovery^{*}.

The author of the Touchstone has observed (519.), "that if the declaration be subsequent, if in the interim between the assurance had, and the declaration of the uses, the conuzor or recoveree sell, give or charge the lands to others, this subsequent declaration will not subvert the mean estate, charge, or interest."

When there are
contradictory
declarations in
the same instrument.

Thirdly. It sometimes happens, that in the same instrument there are two declarations of the use, differing from each other.

The rule is, that the first declaration shall prevail; and that the second shall be void^{*}. When the use is limited by the habendum of a deed, and there is in the subsequent part of the instrument a covenant to levy a fine of the same land to different uses, if the fine be levied after the seisin, out of which the uses are to arise, is transferred to the grantee, there is no ground to contend, that the use limited after the habendum can be controuled by the declaration of the use of the fine; for the deed, transferring the seisin, from which

^{*} Second resolution in *Tregamev. Fletcher*, 2 Salk. 676. *Shep. Touch.* 521. *Vavisor's case*, Dyer, 307.b.

^{*} *Southcoat v. Manory*, Cro. Eliz. 744. *J. C. Moor*, 680. by the name of *Wilmot v. Knowles*.

the use is to arise, is perfected upon the delivery of the deed by the operation of the statute of uses; and the subsequent fine, not operating by way of transmutation of possession, but as a confirmation, or extinguishment of right, there is no seisin to serve the use limited upon it. It is a more difficult case, where the fine is levied of a term preceding the execution of the deed; but even in this case, it should seem, that the fine would be considered merely as a further assurance, not disturbing, but by way of confirmation of, the first limitation of the use^b. The latter point, however, is extremely doubtful.

SECT. VII.
Of declarations
of uses.

Fourthly. The general construction upon, and effect of, the declaration of uses.

The construction upon, and effect of, the declaration.
(184.)

(1.) A very slight expression is sufficient to declare the uses of a fine or recovery; no formal set of words being required for that purpose. Therefore, whenever the intention of the parties can be collected in the limitation of the uses of a fine or recovery upon any expression in a precedent or subsequent declaration or conveyance, such declaration or expression is sufficient to declare the uses of the fine or recovery^c; and the uses may

No formal words are necessary.

(185.)

^b See *Southcoat v. Marmory*, cited above, and see 22 Vin. 227. pl. (9.) 8. *Oliver v. Gyles*, Cro. Eliz. 300.

^c See 3 P. W. 208. 1 Lord Ray. 290. 12 Mod. 162. A covenant for further assurance (Hob. 275. 13 Vin.

SECT. VII. be declared by deed indented, or by deed poll.
Of declarations of uses.

Must be certain as to the persons, place, and estate.

(2.) "The declaration of the uses must be certain, and that especially in three things; "in the persons to whom, in the lands, &c. "of which, and in the estates by which, the "uses are declared; and if there want certainty in either of these, the declaration is "not good: and it must be complete in itself "without any reference to indentures or other "writings to be made afterwards, for then it "is but an imperfect communication, and no "complete declaration¹."

No consideration necessary.

(3.) It is not necessary, that there should be a consideration expressed in a deed to lead or declare the uses of a fine or recovery^k.

Whether it breaks the descent, when it declares the use to the recoverer, or conuzor in fee.

(186.)

(4.) It has been before observed, that if a man, seised on the part of his mother, had made a feoffment without any consideration or declaration, and the use had thereupon resulted to him in fee, or if he had expressly declared the use to himself and his heirs; in either case the descent would not have been broken, but the lands would have descended

305. O. a. pl. 2.), or a condition of re-entry (13 Vin. 309. T. a. pl. 1.), may amount to a declaration of the use.

¹ Shep. Touch. 519. 6th ed.

^k See Har. Co. Litt. 123. a. note 8. 1 Ld. Raym. 290.

to the heirs on the part of the mother¹. So if tenant in tail, who takes by *descent* from his maternal ancestor, suffer a recovery, and declare the use to himself in fee, the descent is not broken, and the newly-acquired fee will descend to the heirs *ex parte maternâ*^m. But here a distinction is taken—if a tenant in tail take by *purchase* under a settlement, made by his ancestor *ex parte maternâ*, and suffer a recovery with a declaration of the use to himself in fee, the estate in fee will descend to his heirs *ex parte paternâ*ⁿ. But it should seem, that in this case, if the reversion in fee *ex parte maternâ* had been in the tenant in tail, a fine by him would have had a different operation; for it is the nature of a fine to let in the reversion^o.

SECT. VII.

Of declarations of uses.

VIII. Upon the construction of the statute, four necessary points are to be observed for the execution of an use^p:—1st; a person *seised* to the use; 2dly; a cestuique use *in esse*; 3dly; a use in esse, *scil.* in possession, reversion, or remainder; 4thly; an estate or *seisin*, out of which the use is to arise; for the words of the statute are, that the estate of such person *seised* to the use shall be adjudged in cestuique use, &c. It follows,

SECT. VIII.

Of uses which are not executed by the statute.

(187.)

¹ See ante, 56. 22 Vin. (a), 5 Term Rep. 107.

185. pl. 4, 5. notes.

^m Roe dem. Crow v. 109.

Baldwre, 5 Term, 104.

ⁿ Martin v. Strachan, note

^o See 5 Term Rep. 108,

^p 1 Co. 126. a.

SECT. VIII. that if the above requisites do not con-
Of uses which are not executed by the statute. cur, there can be no execution of the use :—
 and, therefore, that contingent uses, during
 the suspense of the contingency, cannot be
 executed by the statute ^b.

**1st, Contingent
 uses.**

The doctrine of contingent uses is explain-
 ed in the two cases of *Dillon v. Friene* (or
Chudleigh's case) and *Wegg v. Villers*.

(188.) Chudleigh's case ^c was in effect thus : A.
 enfeoffed B. C. D. and their heirs to the use
 of himself and his heirs on the body of Mary
 (then the wife of sir T. C.), lawfully begot-
 ten, and in default of such issue, to the use
 of his heirs on the body of Elizabeth (then
 the wife of R. B.) lawfully begotten ; and
 in default of such issue, to the use and per-
 formance of his will for ten years immedi-
 ately after his death, and after the said term
 ended, to the use of the said feoffees and
 their heirs during the life of C. C. his son,
 and after his death to the use of the first
 issue male of the said C. C. lawfully to be
 begotten, and to the heirs of the body of
 such first issue male lawfully begotten, and
 in default of such issue, to the use of the se-
 cond issue male, &c. in like manner ; and so
 on to the tenth issue, with several remain-
 ders over, and with the reversion in fee to .

^b *Bac. Uses*, 45.

^c 1 Co. 120. a.

the said A. Afterwards A. died without issue by either of the women; and the feoffees before the birth of the first son of C. C. enfeoffed the said C. C. to the use of himself in fee, without any consideration, but with notice of the former uses. The first son of C. C. was afterwards born; and the question was, whether the feoffment destroyed the use in remainder so limited to the first son of C. C.? which question depended upon another, viz. whether before the contingency happened, i. e. the birth of the son, the use vested, and was executed in the son? It was determined by the majority of the judges, that the use before the contingency was not executed in the son; and that the feoffment entirely destroyed, and prevented the execution of the uses in contingency, although made without any consideration and with notice.

Sect. VIII.

Of uses which are not executed by the statute.

(189.)

By the arguments of the judges in this case, it seems to have been the better opinion, that upon the feoffment of A. all the uses *in esse* were immediately executed, and that there was no present actual seisin left in the feoffees, nor were the contingent uses executed: that though there was no *actual* seisin left in the feoffees after the first feoffment, yet a *possibility* of seisin remained in them to serve the contingent uses, when they should arise, or come *in esse*: that this possibility of

106

SECT. VIII. *seisin, if it had not been disturbed, would have enabled the uses, when they came in case, to have been executed by the statute; but as at the time the uses came in case in the principal case, the possibility of seisin was destroyed, that there consequently could be no seisin left to serve such uses.*

(190.)

In the debate upon the case of *Wegg v. Villers*, reported by Roll and mentioned hereafter, it was agreed, that if a feoffment be made to the use of A. for life, remainder to C. for life, remainder to the first son of C. in tail, with divers contingent uses in remainder, with the remainder to the right heirs of A.; in this case the feoffment of A. will not destroy the contingent uses, because though the remainder to C. was divested, yet he had a right to enter for the forfeiture, which right of entry would support the contingent uses: that if C. had made his entry either in A.'s lifetime, or after his death, that would have reduced the contingent uses; so that if a son had been born in his lifetime, the use to such son would have been executed by the statute without any entry by the first feoffees; that if C. had died leaving a son, and without having made his entry, the first feoffees might have entered, and thereby restored their seisin (*scintilla juris*) to serve the use to the son of C.

In the first edition of this work, the following case was stated. If there be a feoffment to the use of A. for life, remainder to his first son, &c. remainder over, if A., before the birth of a son, make a feoffment, this shall divest all the estates, *but still there is a right of entry in the feoffees to restore the former estate*, and upon their entry they have a seisin sufficient to serve the use to such first son. But the case thus put, as to the right of entry in the feoffees, and the operation of it, does not appear to be correct. For supposing the *scintilla juris* remaining in the feoffees could enable them to enter to revest the estates divested (which it will do in particular cases, as in the case previously mentioned from Roll), yet in the case here stated their entry could serve no purpose whatsoever. For there being no son born at the time of the entry, the use to such son could never be executed; according to the rule; that a contingent remainder must take effect (if at all) *eo instante*, that the particular estate determines. If indeed, as in the case from Roll, a vested estate had supported the contingent remainder, till it came *in esse*, and then the intervening tenant of the vested estate for life had died, without having made an entry, the entry of the feoffees would have supported the contingent remainder, which came *in esse* during the existence of

Sacr. VIII.

Of uses which
are not executed by the statute.

(191.)

Sect. VIII.
Of uses which
are not exe-
cuted by the sta-
tute.

(192.)

the intervening estate. But that is different from the present case. In the case from Roll the vested estate supported the contingent remainder during its contingency, and the subsequent entry of the feoffees restored the seisin to serve the use, which *then* was *in esse*. In the present case the general feoffees have no vested estate to preserve the contingent remainders during their contingency; but could by their entry only give such a seisin, as would *serve uses in esse at that time*; it was the want of this vested estate in feoffees (*which it was agreed in Chudleigh's case they had not*), that gave rise to the practice of inserting trustees to preserve contingent remainders. By this mode the trustees have a power to enter for forfeiture, and to continue in possession during the life of the tenant for life; and this estate, limited to them upon commission of forfeiture, has been held to be a vested estate, and will preserve the contingent uses as effectually, as the intervening estate for life in the case put by Roll, supposing the trustees in the one case, and the intervening tenant in the other, to make an *actual entry*. Indeed Mr. Fearn has endeavoured to prove, that the mere *right* of (without an *actual*) *entry* will preserve the contingent uses *.

* See 22 Vin. 225, pl. 3. and cases in the note.

It will be necessary to state fully the case of Wigg and Villiers^f, and the resolutions upon it. Sacr. VIII.
Of uses which
are not executed by the statute.

(193.)
 “ If A. seised of land in fee covenants for
 “ natural affection to stand seised to the use
 “ of himself for life, the remainder to his
 “ wife for life, the remainder to B. his daughter
 “ for life, the remainder to the first son
 “ to be begotten of the body of B., and after
 “ to divers other sons of B. in like manner,
 “ the remainder to his right heirs; and after
 “ A. grants his reversion in fee to J. S. to
 “ the use of J. S. and his heirs, but without
 “ any consideration, reciting in the deed the
 “ said uses, by which the grantee has conu-
 “ zance of the uses, and so he is subject to
 “ the said contingent estate, and this grant
 “ is no disturbance of them. And afterwards
 “ A. makes feoffment in fee of the land, and
 “ then B. takes baron, and has issue a son,
 “ and then A. dies, and his feme enters, and
 “ after B. dies, and then the feme dies so
 “ seised. In this case the contingent use to
 “ the first son of B. is not destroyed; but he
 “ may enter, for the feoffment of A. was a
 “ forfeiture of his estate, and of the estate
 “ of his wife in remainder during the cover-
 “ ture, so that B. might have entered for the
 “ forfeiture during the coverture; and so B.

^f 2 Roll Ab. 796. 22 Vin. 228, 229, 230.

Sacr. VIII. " had a right of entry, which was sufficient
 Of uses which " to support the contingent remainder, to the
 are not exe- " first son, &c. without question. But the
 cuted by the sta- " case had been more dubious, if B. had not
 tute. " had any estate for life; but that the con-
 " tingent remainders had depended on the
 " estate of the wife immediately, where the
 " feoffment of the baron had destroyed them,
 " inasmuch as the feoffment of the baron
 " passed his estate, and the estate of the wife
 " during the coverture; so that none can
 " enter during the coverture; and so neither
 " the estate of the baron, nor of the wife *in*
 " *esse* during this time, to support the con-
 " tingent uses. But this doubt does not come
 " in question in this case, inasmuch as B.
 " had an estate for life in remainder, which
 " was only divested by the feoffment, and
 " turned to a right, and she had a present
 " right of entry for a forfeiture. And when
 " A. the baron died, and his wife entered,
 " this reduced her estate for life, and the es-
 " tate of B. for her life; and so the contin-
 " gent use reduced also; and vested, by
 " force of the statute of uses, in the first son
 " of B.

" In the debate of this case between me
 " and my brothers Nicholas and Aske, it
 " was agreed and resolved, that if a feoff-
 " ment be made by A. and B. in fee to the
 " use of A. for life, the remainder to C. for

" life, the remainder to the eldest son of C. SECT. VIII.
 " in-tail, with diverse contingent uses after Of uses which
 " in remainder, the remainder to the right are not exe-
 " heirs of A. in fee; that in this case the cuted by the sta-
 " feoffment of A. will not destroy the con- tute.
 " tingent uses, because the remainder to C.
 " though it be divested, yet he shall have a
 " right of entry for a forfeiture, and a right
 " to the remainder, which is sufficient to sup-
 " port the contingent uses; for this is the
 " common assurance upon marriages and the
 " common practice.

" And it was also agreed and resolved by
 " us, That in the said case, if C., who is in
 " remainder for life, enters into the land,
 " either in the lifetime of A. or after his
 " death, this shall reduce the contingent re-
 " mainders, so that if a son be born in his
 " life, his contingent estate shall be settled
 " and executed by the statute of uses, with-
 " out any re-entry, by the first feoffees; for
 " this is an incident of the first livery.

" And it was also resolved and agreed
 " between us, That if, after the feoffment
 " of A. if C. had not entered, but died be-
 " fore entry, yet if the first son of C. was
 " born in his life, he cannot enter, though
 " his contingent estate is not destroyed, be-
 " cause this was not executed in the life
 " of C.; the estate of C. being turned to a

Sect. VIII. "right, and so the contingent disturbed.
 Of uses which "But in this case, the first feoffees may enter
 are not exe- "to revive this contingent use, and then by
 cuted by the sta- "their entry the contingent use shall be set-
 tute. "tled and executed in the first son, by the
 "statute of uses; for there is a *scintilla*
 "of necessity, to revive contingent uses; for
 "otherwise the contingent use would be de-
 "stroyed.

"It was also agreed and resolved by us,
 "That when a feoffment is made to certain
 "uses, with diverse remainders over in con-
 "tingency, and no estate left in the feoffees,
 "and after the feoffees enter into the land,
 "and disseise the tenant in possession, and
 "make feoffment in fee, that this does not
 "destroy the contingent uses, if the tenant in
 "possession or any in remainder, in whom an
 "estate certain was settled before the feoff-
 "ment, re-enters; for his re-entry shall re-
 "duce all the contingent remainders, and
 "shall make them capable of execution by
 "the statute of uses; for the feoffees are but
 "conduits to convey the estates, and have
 "not any power left in them to destroy any
 "contingent uses.

"It was also agreed and resolved by us,
 "That when a feoffment is made to certain
 "uses, with diverse remainders over in con-

"tingency, and no estate left in the feoffees,
 "yet if the estates *in esse* are divested,
 "either by disseisin, or by feoffment, or
 "otherwise, before the contingents happen,
 "and after the contingents happen, during
 "the divestment, and after the estates *in*
 "*esse* determine before any re-entry; if the
 "feoffees release all their right in the land,
 "or make feoffment of the land, or bar their
 "entry by any other way, in this case the
 "contingent can never be revived to be exe-
 "cuted by the statute of uses, because the
 "feoffees who had *scintillam juris* in them,
 "in case of necessity to revive the contin-
 "gent uses, have barred their entry to revive
 "the contingent uses, and no other can re-
 "vive them, so that they cannot be executed
 "by the statute."

SECT. VIII.

Of uses which
 are not exe-
 cuted by the sta-
 tute.

(2.) Uses limited of copyhold lands are not within the statute of uses*; for if uses were permitted to be limited on conveyances of copyhold estates, there would be a transmutation of possession by the sole operation of the law; which would be contrary to the nature of copyhold tenure. It is a principle of that tenure, that the lands cannot be aliened without the consent of the lord.

Uses limited of
 copyhold
 estates.
 (195.)

(3.) As the statute 27 Hen. 8. c. 10. was made previously to the statute of wills, 32

Devises to uses.

* 1 Co. Copy. sec. 54. Cro. Car. 44. 2 Ves. 257.

SECT. VIII.
Of uses which
are not exe-
cuted by the sta-
tute.
(196.)

and 34 Hen 8., it seems to follow, that the former does not extend to *devises* to uses; for a statute cannot be considered to extend to any thing, which at the time of the making of it did not exist^f. But as the testa-

^f Sid. 26. in *Hore v. Dix.*
Note, 1 Co. Litt. 271. b.
under fol. 277. a.

Uses limited upon a *seisin* created by devise are no doubt executed and become legal estates; and whether they be executed by the operation of the statute of uses, or by virtue of the principle of decision in courts of justice, which gives effect to the devisor's intention, is of no real practical importance. The position, however, that an act cannot extend to any thing not existing at the time of its passing into a law, is too generally stated. The author thinks it necessary to subjoin the following extracts from Vernon's case, 4 Co. 4. a. "Note reader in the said case reported by the lord Brook, it is further said, that a devise of land by the husband to the wife by will, is no bar of her dower, for it is a benevolence and not a jointure, *per justiciarios*. as it is there reported; and that is good law, if it is well understood. And as to that, some have said, that no estate devised by will can be a jointure within 27 H. 8. c. 10., for two reasons:—1. That by the said act of 27 H. 8.

"the whole estate of the feoffees was transferred to *cestuique* use, and *per consequens* no land after the making of that act, was devisable till the stat. of 32 H. 8., and therefore a devise of land, which then by the law could not be made, cannot be within the said act 27 H. 8. The other reason was, because every jointure intended within the act 27 H. 8. is made and assured either before or during the coverture, as appears by the said act, but a devise takes its effect after the husband's death: but that neither of these is any reason in law, appears by the resolution following, Mich. 38 and 39 Eliz. between Leak and Randall in the Court of Wards, it was resolved by the two chief justices, and *tot. cur.* that if a man devises land to his wife for term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower, for two reasons:—1. Because a devise implies a consideration in itself; and therefore as a devise cannot be averred to be to the use of another than of the de-

tor's intention is generally the guide in cases of devises, it has been repeatedly determined, that if A. devise to B. and his heirs, to the use of, or in trust for, C. and his heirs, or in trust to permit C. and his heirs to take the profits, it shows, that the testator intended, that C. should have the *legal* estate in fee; and the law, upon this interpretation of the testator's meaning, will give the devise such an operation. But it is clear, that if there be a devise to the use of A. for *life*, remainder

Sacr. VIII.

Of uses which are not executed by the statute.

"visee, unless it is expressed in the will; no more can a devise be averred to be for a jointure, unless it is so expressed in the will: but as it is said in the said case, 6 E. 6., it shall be taken for a benevolence, and so is the said case of 6 E. 6. to be intended. 2. The whole will concerning lands by the statutes of 32 and 34 H. 8. ought to be in writing, and no averment ought to be taken out of the will which cannot be collected by the words contained in the will. But if a man devises land to a woman for term of her life or in tail, &c. for her jointure, and in satisfaction of her dower, it was resolved, that it is a jointure within the act of 27 H. 8.: for as an estate for life made to a woman for her jointure before marriage, when she is not his wife, is within the equity of the said act, so an es-

tate for life devised to a woman for her life, which takes effect after his death, when the marriage is dissolved, is also within the equity of the said act, for such estate well agrees with the intent of the makers of the said act of 27 H. 8., and with the said description of a jointure made by the justices in the said case of Vernon. And although land was not devisable until 32 H. 8., yet it is frequent in our books, that an act made of late time shall be taken within the equity of an act made long time before."

Sir Edward Coke then proceeds to state several instances, establishing this construction. See also 2 lord Raym. 1028. in sir Wm. Moore's case, 22 Vin. 210. pl. 7. and note.

1 Vern. 79. 415. 2 Salk. 679. 2 Atk. 573. 2 P. W. 134.

Sect. VIII. over, this cannot take effect by way of use, executed by the statute, because there is no *seisin* to serve the use: but still the cestuique use will have the legal estate.

Of uses which are not executed by the statute.

Trusts to pay over, &c.

(197.) (4.) Very soon after the statute of uses an opinion was delivered, that though a feoffment in fee to the use of the feoffor for life, and after his decease that J. N. *shall take the profits*, be an use executed in J. N.; yet if it had been, that after his death the feoffees should receive the profits, and pay them over to J. N.; this would not be executed by the statute^b, because the legal estate must be in the feoffees in order to enable them to pay over the profits. This construction has ever since prevailed; and therefore it is now clear, that if there be a conveyance in trust to pay over the profitsⁱ, or to convey^k, or to sell^l, &c. the legal estate must, in these cases, necessarily vest in the trustees. So it is of a trust to permit a feme covert to receive the profits for, or to pay the same to, her separate use^m.

^b 36 Hen. 8. Bro. Feoff. al. Uses, 52. B. N. C. 282.

ⁱ Symson v. Turner, 1 Eq. Ab. 383. Silvester v. Wilson, 2 Term Rep. 444. 15 Ves. 371. and Shapland v. Smith, 1 Bro. Cha. Ca. 75.

^k Roberts v. Dixwell, 1

Atk. 607. Bac. Uses, 8.

^l See ante 4. Bagshaw v. Spencer, 2 Atk. 578.

^m Pybus v. Smith, 3 Bro. Cha. Ca. 340. Henry v. Purcell, Fearn, 75. Nevill v. Saunders, 1 Vern. 415. See Bush v. Allen, 5 Mod. 63.

It is sometimes difficult to determine the extent of the legal estate vested in trustees under trusts of the above description.

SECT. VIII.

Of uses which are not executed by the statute.

In the case of Doe on the demise of White v. Simpson^a, there was a devise to trustees and the survivor of them, and the executors and administrators of such survivor, of real estate, in trust, "*out of the rents and profits of the said estate and the arrears due,*" to pay certain annuities, and a gross sum of 800*l.*; and from and after payment of the said annuities, and the said sum of 800*l.*, the testator devised the estate to his brother William for life. Lord Ellenborough said, that he and the other judges were of opinion, "that the trustees took an estate by implication for the lives of the annuitants, with a term of years in remainder for the purpose of raising the sum of 800*l.*; and that after those trusts were satisfied, the several limitations for life and in tail, took effect as legal limitations."

In the case of Jones v. Say and Sele^o (which lord Kenyon said was a case by itself^p), there was a devise of manors, and other hereditaments, to trustees and their heirs; in trust, out of "*the rents, issues, and*

^a 5 East, 162.

^o 8 Vin. 262. pl. 19. 3

Bro. Par. Ca. 118. S. C. 1

Ves. 144. S. C. cited.

^p 7 Term Rep. 654.

Sect. VIII.
Of uses which
are not exe-
cuted by the sta-
tute.

"*profits*," to pay the several legacies, devises, and bequests, thereafter mentioned: then follow bequests of annuities and pecuniary legacies¹; and after reimbursing the costs and expenses of the trustees, and paying the annuities and legacies, in trust to pay all the residue of the rents and profits to Cecil Fiennes, during her life, for her separate use; and after her death, the trustees were to stand seised of the premises, to the use of the heirs of her body, *subject to the payment of the annuities and legacies*. It was determined, that the legal estate vested in the trustees, during the life only of Cecil Fiennes, and that the limitation to the use of the heirs of her body carried the legal estate.

It is presumed, that in both the cases above stated, the ground of determination was, that the words, rents and profits, did not create a trust for sale of the devised estate²; for it seems to be clear, upon principle as well as authority, that where a trust authorizes the trustees to sell, the legal estate in fee-simple must necessarily vest in them, in order to enable them to perform their trust.

¹ See 3 Bro. Par. Ca. 113.

² Perhaps the words, "*and arrears due*," in the one case, and "*subject to the payment of the annuities and legacies*," in

the other, were considered as explanatory of the testator's intention, to confine the words, rents and profits, to annual rents.

In *Bagshaw v. Spencer*^{*}, the devise was to several trustees, their heirs and assigns, upon trust out of the rents, or by sale or mortgage, to pay the testator's debts; and after payment thereof, the testator devised the same estates to three of the same trustees for a term of years, and after the determination of the said term, he devised the same estates to all the trustees and their heirs, upon certain trusts. Lord Hardwicke said, "The devise is to trustees and their heirs, which carries the whole fee in law; the devise to sell would have carried the fee, if the word *heirs* had not been mentioned."—"In the present case, the whole fee being devised to the trustees, no legal fee could be limited upon it."

Sacr. VIII.

Of uses which are not executed by the testator.

Next as to its being good by way of executory devise, his lordship said, it was too remote, it being after all the debts paid, which might take in a much further time, than the law allows.

In *Gibson v. Rogers*[†], there was a devise of freehold, leasehold, and personal estates to trustees, their "*executors, administrators,*" and assigns, in trust to pay certain annuities and legacies out of the rents and profits of the personal estate; and if that should be

^{*} 2 Atk. 570. 577. 1 Ves. 142. 144. S. C. [†] Amb. 92.

SECT. VIII. deficient, then out of the "*rents and profits*" of the real estate; and as to the residue of the real and personal estates after provision for payment of the annuities and legacies, the testator gave the same to the children of Frances Gibson. Lord Hardwicke, in this case, thought, that the words, *rents and profits*, would authorize the trustees to sell the real estate; and that the legal estate in fee-simple vested in the trustees. The same rule of construction is adopted in the case of Wright v. Pearson^u.

Of uses which are not executed by the statute.

In a case, where there was a devise to trustees and their heirs, in trust to permit a feme covert to receive the rents and profits for her separate use for life, and after her decease, *to the use* of the first and other sons of her body, &c., with other limitations over, in default of issue, for the *separate use* of other *femes covert*, it was determined, that the legal estate *in fee-simple* vested in the trustees^v.

Terms of years and other chattels.

(198.)

(5.) As the statute says, that when any person or persons stand *seised* to the use of another, &c., it has been resolved, that a term of years or other chattel interest cannot be limited to a use^w.

^u Amb. 360.

^v Harton v. Harton, 7

Term Rep. 652.

^w Bac. Uses, 42.

(6.) When the courts of law, after the statute of Hen. 8., took cognizance of uses, they held, that no use limited upon a use could be executed by the statute; and therefore if there be a conveyance to the use of A. and his heirs, to the use of B. and his heirs, this use cannot be executed in B.^{*} So if land be limited to A. and his heirs to the intent *or in* trust, that B. and his heirs may receive a rent thereout *to the use* of C. and his heirs, the legal estate in the rent will vest in B. by the fifth clause of the statute[†]; because the seisin, out of which the rent arises, is conveyed to A., and upon the limitation of such rent to B., the statute is satisfied. There has been however an exception, and I believe only one exception, to this rule. A recovery was suffered of lands to *the use* of A. and his heirs, yielding for the same a rent to B.; it was urged, that the rent ought to have been limited out of the estate of the recoverors; and not out of the possession of *cestuique use*; yet it was determined, that the rent was well executed by the statute.[‡]

SECT. VIII.

Of uses which are not executed by the statute.

Use upon a use.

(199.)

^{*} 36 Hen. 8. B. N. C. 284. Tyrrel's case, Dyer, 155. a. Sambach v. Dalton, Tothil, 1 Atk. 591.

[†] Chaplin v. Chaplin, 3 P. W. 229.

[‡] Cromwell's case, 2 Co. 69. b.

CHAP. III.

Of Trusts since the Statute 27 Hen. 8. c. 10.

Sect. I.
Of the introduction and
system of trusts
since the statute.

(200.)

(201.)

I. THE construction adopted by the courts of law upon the statute of uses obliged cestui-que trust, entitled to a beneficial interest, not executed by the statute, to apply for redress to the Court of Chancery; and the consequence of the statute has been, that the ancient use has been abolished with its inconveniencies, and a secondary use has been introduced under the name of trust, modelled by the Court of Chancery, after its own fashion, and being, as it is properly called, a creature of equity. The Chancery was aware of the mischiefs attendant upon uses before the statute; and, therefore, in exercising an exclusive controul over these trusts, it has formed them, so as to answer all the contingencies of family settlements and domestic provisions. The observation, therefore, of lord Hardwicke^a, that the statute of uses "*has had no other effect*, than to add at most "*three words to a conveyance*," is not substantially correct; for by extinguishing the

fiduciary existence of the use, the statute has, in effect, been the occasion of raising a system of equity, which lord Mansfield calls^b "noble, rational, and uniform," in the place of a system at once unjust and inconvenient. "Trusts," says his lordship, "are made to answer the exigencies of families and all purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Hen. 8. meant to avoid."

Sec. 1.

Of the introduction and system of trusts since the statute.

An expression is sometimes to be found in the books, that trusts are now, what uses formerly were. A use, indeed, before the statute of uses, was, as a trust since is, a fiduciary or beneficial interest, distinct from the legal estate; and so far the expression is correct: but, abstractedly no objection can arise to the essence or quality, either of the use or trust. It was the system, adopted with respect to uses by courts of justice, which gave rise to the necessity of passing the statute of uses; and the difference between uses before, and trusts since, the statute, consists in the opposite construction adopted by the Court of Chancery respecting them; or, as it has been said, "there is no difference in the principles, but there is a wide difference in the exercise of them."

(202.)

^b 1 Wm. Black. 160.^c Ibid. 180.

SECT. I.

Of the introduction and system of trusts since the statute.

The trust, occasioned by the statute of uses, is of a permanent and general nature, or a secondary use. But the system introduced by the Court of Chancery, relative to trusts since the statute, extends not only to trusts declared upon a legal estate in fee, but to those declared upon the estates of tenants in tail, for life and years, and to the special trust before noticed.

Of the trust estate.

SECT. II.

Of the definition and several kinds of trusts.

(203.)

II. A trust, generally speaking, is a right on the part of the cestuique trust to receive the profits, and to dispose of the lands in equity^d. But there may be special trusts for the accumulation of profits, the sale of estates, or the conversion of one trust fund into another, which may preclude all power of interference on the part of cestuique trust, until such special trust be satisfied; and there is a distinction between trusts executed and trusts executory.

Difference between a trust and equity of redemption.

A trust does not include every equitable interest. An equity of redemption is said to be a title in equity, and not merely a trust. In *Pawlett v. the Attorney-general*^e, sir Matthew Hale observes, "there is a diversity

^d 1 Mod. 17.

^e Hard. 465. In *Tucker v. Thurstan*, 17 Ves. 133. lord Eldon observes, that

a trust estate and an equity of redemption, are in many respects most materially different. See also post, 205.

“ betwixt a trust and a power of redemption; **SECT. II.**
 “ for a trust is created by the contract of the *Of the definition and several kinds of trusts.*
 “ party, and he may direct it as he pleaseth;
 “ and he may provide for the execution of it:
 “ and, therefore, one that comes in in the *post*
 “ shall not be liable to it, without express
 “ mention made by the party. And the
 “ rules for executing a trust have often varied;
 “ and, therefore, they only are bound
 “ by it, who come in in *priority of estate*. A
 “ tenant in *dower* is bound by it, because she
 “ is in in the *per*, but not a tenant by the
 “ *curtesy*, who is in in the *post*. So all who
 “ come in in *priority of estate*, or with notice,
 “ or without a *consideration*. But a power of
 “ redemption is an equitable right inherent
 “ in the land, and binds all persons in the
 “ *post*, or otherwise; because it is an ancient
 “ right, which the party is entitled to in
 “ equity.”

III. It has been intimated, that the courts **SECT. III.**
 of equity, in forming a system respecting
 the secondary use, or modern trust, occasioned
 by the statute of uses, have endeavoured to
 avoid the mischiefs, arising from the ancient
 use. It will be now necessary to state the properties
 of the trust estate, as distinguished from
 the legal seisin of the trustee, and to inquire
 into the rules, by which trusts are governed.
 (204.)

SECT. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

It is a maxim generally received, that in the construction of trusts, the courts of equity adopt the rules of law applicable to legal estates. In some cases, however, the assistance of the legislature has been required to preserve the uniformity.

Limitations of trust estates.

(1.) If a term of years be assigned to A. in trust for B. and his heirs, the trust of the term will, notwithstanding, be personal estate in the cestuique trust, and will consequently devolve upon his executors^f. The converse of this rule is also adopted. The equitable interest in a freehold estate, cannot be so framed, as to make it go perpetually to the executor of cestuique trust, as personal estate.

Estate tail.

In the case of trusts executed, words of limitation, which if applied to real property would create an estate tail, will also create an estate tail in the trust or beneficial interest^g; and, therefore, the rule of law will prevail, although the intention of a testator, in the case of wills, may be inferred to the contrary, by his expressly restraining the

^f See 1 Vern. 164, and *Hunt v. Baker*, 2 Freem. 62.

^g "In limitations of a trust either of real or personal estate, the construction ought to be

"made according to the construction of limitations of a legal estate." Per lord Hardwicke, in *Garth v. Baldwin*, 2 Ves. 646. 655.

equitable estate of the first taker, to an estate for life^b, or by making it unimpeachable for wasteⁱ, or by using the word *issue*^k, instead of the word heirs of the body, or by granting to the first taker a power of leasing^l, or by introducing a limitation to trustees to preserve contingent remainders^m, or by adding after a limitation "to the heirs "male of the body" of the first taker, words, which denote an intention, that such heirs male should take in succession according to seniority of ageⁿ.

SECT. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

(2.) Trust estates descend according to the rule of descents of legal estates; and, therefore, in the case of gavelkind and borough-english lands, trusts affecting them will descend according to the descendible quality of the tenure^o. There shall be a *possessio fratris*^p of a trust; and where the ultimate limitation of a trust is to the right heirs of the person creating or conveying it, the heirs will take by descent, notwithstanding the grantor has no particular estate^q.

Descent of trust estates.

^b Shaw v. Weigh, 1 Eq. Ab. 184. pl. 28. 8 Vin. 257. pl. 25, 26. S. C.

ⁱ Ibid. Jones v. Morgan, 1 Bro. Cha. Ca. 206.

^k Shaw v. Weigh, *supra*.

^l Bale v. Coleman, 1 P. W. 142.

^m Jones v. Morgan, *supra*. Poole v. Poole, 3 Bos. and Pull, 620.

ⁿ Ibid.

^o 2 Ves. 304. in the case of Fawcett v. Lowther. Jones v. Renabie, 22 Vin. 185, pl. 7.

^p 2 P. W. 713. 736.

^q Godolphin v. Abington, 2 Atk. 57. Watk. Descent, 264. See ante 59. note a. as to uses *before* the statute.

SECT. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

Trust estates may be conveyed.

(3.) Not only a trust *in esse*, but the possibility of a trust, may be assigned in equity^r; and it has been determined^s, that a husband may dispose of the trust of a term, to which he is entitled in right of his wife; and it should seem, that in case the husband shall survive his wife before such disposition made by him, he will be entitled to the trust upon the survivorship, without taking out letters of administration to the wife^t.

(295.)

Trust estates may be devised.

(4.) A trust may also be devised^u, with the solemnities required by the statute of frauds upon the devise of legal estates^v; and as copyhold estates are not within that statute, trusts declared upon them will pass by an unattested will^w.

Execution may issue upon the trust estate.

(5.) By virtue of the statute of frauds, trust estates are made liable to executions upon judgments, statutes, and recognizances^x.

^r Warmstrey v. Tanfield, 1 Cha. Rep. 29. 1 Cha. Ca. 8. See cases collected in note 21 Vin. 516. pl. 1.

^s Tudor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 208. note 1.

^t Pale v. Michell, 2 Eq. Ab. 198. pl. 4.

^u See Fearne, 539. 1 Cha. Ca. 211. in Cornbury v. Middleton. 2 Vern. 680. in Greenhill v. Greenhill.

^v Wagstaff v. Wagstaff, 2 Cox's P. W. 258. note 1.

Adlington v. Can, 3 Atk. 151.

^w Tuffnell v. Page, 2 Atk. 37. note 2. last edit.

^x 29 Car. 2. c. 3. s. 10.

"It shall be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and de-

Upon the construction of this statute, it has been determined, that it does not authorize, either the trust^y or the equity of redemption^s of a term of years, to be taken in execution.

Sacr. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

In the case of *Lyster v. Dolland*^a, lord Thurlow is reported to have said, "If this had been a mortgage in fee, he could only have extended it to hold *quousque*."

But it seems impossible to contend, that under the statute of frauds the sheriff can deliver an equity of redemption upon an execution in a suit against the mortgagor: and in the case of *Plunket v. Penson*^b, lord Hardwicke is stated to have said, "I should be glad to be informed, whether there is any instance, where an equity of redemption has ever been held to be liable to the exe-

" liver execution unto the
" party in that behalf suing
" of all such lands, tene-
" ments, rectories, tithes,
" rents and hereditaments,
" as any other person or
" persons be in any manner
" of wise seised or pos-
" sessed, or hereafter shall
" be seised or possessed, in
" trust for him against whom
" execution is so sued, like
" as the sheriff or other of-
" ficer might or ought to
" have done, if the said
" party against whom exe-
" cution hereafter shall be

" so sued, had been seised
" of such lands, tenements,
" rectories, tithes, rents, or
" other hereditaments of
" such estate as they be
" seised of in trust for him
" at the time of the said
" execution sued."

^y *Scott v. Scholey*, 8 East, 467.

^s *King v. Marissal*, 3 Atk. 192. *Burden v. Kennedy*, 3 Atk. 739. *Lyster v. Dolland*, 1 Ves. jun. 431.

^a *Supra*.

^b 2 Atk. 290.

SECT. III. "cution of a bond creditor in the life of the
 "mortgagor:" to which the counsel in the
 case made answer, they could not recollect
 any instance, where it had been so held.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

From the case of *Hunt v. Coles*, Com. Rep. 226. it appears, that, under this statute, a judgment is not a lien upon the trust estate; and, therefore, that a purchaser for a valuable consideration and without notice, obtaining a conveyance of the legal estate from the trustee, and of the equitable interest from the cestuique trust, will not be bound by a judgment previously entered up against the cestuique trust.

Assets.

(6.) Previously to the statute of frauds, 29 Car. 2. c. 3., the trust of an estate in fee-simple was not assets at law, or in equity, in the hands of the heir of the cestuique trust to satisfy bond debts^b; but by the 10th section^c of that statute, the trust is

^b See Bennet and Brownlow, Cha. Ca. 12. 3 Vin. 142. pl. 10, 11. and the cases collected in the notes.

^c "And if any cestuique trust hereafter shall die, leaving a trust in fee-simple to descend to his heir, then and in every such case, such trust shall be deemed and taken, and is hereby de-

clared to be assets by descent, and the heir shall be liable to, and chargeable with, the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended,

now made legal assets^d. An equity of redemption is not considered a trust within the statute; and, therefore, it has been determined to be equitable, and not legal assets^e.

Sacr. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

It seems, that both previously to and since the statute of frauds, the trust of a term of years was considered as equitable assets in the hands of the executor^f; and the statute does not now make it legal assets^g; except in the case of a term of years attendant upon the inheritance, in which case the term becomes consolidated in equity with the freehold^h.

(7.) It is apparent from the necessity, which produced the statute of frauds, that the legal estate vested in the trustee, could not be taken in execution upon a judgment against the cestuique trust: but it seems, that the lands of cestuique trust were always held

Trusts subject to extents from the crown.

"any law, custom, or usage, to the contrary in any wise notwithstanding."

^d King v. Ballet, 2 Vern. 248. See Robinson v. Tong, 3 Vin. 145. pl. 28. as to the trust of an advowson in gross.

^e Plunket v. Penson, 2 Atk. 290.

^f 3 Cha. Rep. 37. in Attorney-general v. Sands, 31 Car. 1. Sir Chas. Cox's

case, 3 P. W. 341. Hartwell v. Chitters, Amb. 308.

^g King v. Ballet, supra.

^h 2 Cha. Ca. 152. in Ratcliff v. Graves, 35 Car. 2. This rule, which does not require the aid of authority to support it, was, however, formerly subject to controversy. See 3 Vin. 148, 144. pl. 16. 20. and the various cases collected in the notes.

SECT. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

liable to an extent for a debt due to the king¹. Sir Matthew Hale observes, that this rule was adopted "*per cursum scaccarii*, which "*makes the law in such cases*"².

The statute of 13th Eliz. c. 4. s. 5. which relates to accountants to the crown, extends to trusts by express words; and not only a trust, but an equity of redemption¹, may be sold under an extent issued against an accountant, by virtue of the statute of the 25 Geo. 3. c. 35., which, in order to facilitate the payment of debts due to the crown, authorizes the Court of Exchequer, in a summary way, to direct the extended lands of an accountant to be sold.

Forfeiture for treason.

(8.) At the common law, a trust in fee-simple or in tail, was not forfeited to the crown by the attainder of cestuique trust for treason^m; but the statute 33 H. 8. c. 20. s. 2. (which extends to all manner of treasonsⁿ), includes trust estates^o, and also extends to an equity of redemption^p.

¹ Walter de Chirton's case, Dy. 160. a. 24 Edw. 3. 16 Vin. 521. K. pl. 1. notes.

² Hard. 495.

¹ The King v. De la Motte, Forest, 162.

^m See Jenkins, 190. Hard. 495.

ⁿ 2 Co. Rep. 11. a. Hard. 495.

^o Attorney-general v. Crofts, 4 Bro. P. C. 136.

^p

The ground of this latter decision is, that the statute of treasons above noticed, has the word *conditions*; so, that if a mortgage in fee be made subject to a condition of re-entry, and the mortgagor commits treason before the day of payment, the king, by the forfeiture, shall have the benefit of the condition; and if the estate shall become absolute in the mortgagee in consequence of the non-payment of the mortgage-money, an equity attaches upon the mortgagee, in favour of the crown upon the same principle, that it would have attached upon the mortgagor, in case he had not committed treason.

SECT. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

It is said that a cestuique trust of a term of years forfeits it for felony, and upon an outlawry in a personal action¹.

(9.) In the marquis of Winchester's case², it is said, "that although an use were an hereditament (for there shall be a *possessio fratris* of it), yet, by the general words of "all hereditaments, an use was not given to the king by any act of attainder." It has, however, been determined in the modern case of *Shrapnel v. Vernon*³, that an equity of

Equitable estates considered as legal, in the construction of acts of parliament.

¹ Earl of Somerset's case, Hob. 214. Jenk. 190. Hard. 490.

² 3 Co. 2. b. and see *ibid.* 10. b.

³ 2 Bro. Cha. Rep. 268. and see also *Tucker v. Thurston*, 17 Ves. 131.

SECT. III. redemption was within the 8th section of 17 Geo. 3. c. 26., which does not comprise either the word trust or condition. In that case lord Thurlow said, "In many acts of parliament an equitable estate is considered the same, as if it were a legal estate; the words, seised in law or in equity, in the qualification act, show, that the word *seised* is applicable to both." He adds, "The only question is, whether the word *seisin* will extend to being seised of an estate in equity, which, unless I am mistaken in point of law, it will."

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

Tenant by the curtesy.

(10.) There may be a tenant by the curtesy of a trust of inheritance¹; unless the husband is excluded by an express trust for the separate use of his wife; as where lands were devised to trustees and their heirs, in trust for the separate use of the testator's daughter during her life, and after her decease, for such persons to whom she should devise the same; lord Hardwicke decreed, that the husband should not have his curtesy².

Statutes of limitations.

(11.) The statutes of limitations, 32 H. 8. c. 2. and 21 Jac. 1. c. 16., expressly extend

¹ Watts v. Ball, 1 P. W. Scarfe, 1 Atk. 603.
108. Chaplin v. Chaplin, ² Hearle v. Grogan, 3 P. W. 234. Casborne v. 3 Atk. 695. 716.

to actions and proceedings in courts of law; and, consequently, they cannot apply to suits in equity. But, as the Master of the Rolls, in *Beckford v. Wade*, observes, "Courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time; and they refer frequently to the statutes of limitation for no other purpose, than as furnishing a convenient measure for the length of time, that ought to operate as a bar, in equity, of any particular demand."

SECT. III.

In what cases trusts are governed by, or similar to, the laws relative to legal estates.

IV. But the rule, that equity follows the law, has its exceptions; and in some instances the peculiarity of trusts bears no analogy to the system of property at common law.

SECT. IV.

In what cases trusts differ from legal estates.

(1.) Although the trust of an estate of inheritance is subject to curtesy, it is not to dower^a. It must be admitted, that there is an apparent inconsistency in this distinction; but it was adopted from motives of convenience, and not from principle. Purchasers by the advice of conveyancers, who had formed their opinion upon trusts from the ancient use, having taken their conveyances

Dower.

^a 17 Ves. 87. 97. 15 Ves. 496. See upon this head, *Smith v. Clay*, 3 Bro. Cha. Ca. 639. in note. Amb. 646. S. C. *Colt v. Colt*, 1 Cha. Rep. 254. *Bottomley v. Fairfax*, Prec. Cha. 396. *Godwin v. Winsmore*, 2 Atk. 525. *Dixon v. Saville*, 1 Bro. 326.

SECT. IV. in the names of trustees for the purpose of barring dower, the courts of equity protected the purchaser at the expense of the wife's equitable right^b.

In what cases trusts differ from legal estates.

(207.) (2.) The trust of an inheritance will not escheat to the lord upon the attainder of cestuique trust for felony, or for want of heirs^c; because upon the attainder or death the trust is absolutely determined.

Escheat.

The effect of length of time between trustee and cestuique trust.

(3.) In the case of a direct trust, as where an estate is conveyed to the use of A. and his heirs, in trust for B. and his heirs, no time, as between the trustee and cestuique trust, can operate as a bar to the equitable rights of the latter^d; for between him and his trustee, there is no adverse possession. If the trustee acquires the actual possession, it is still for the benefit of the cestuique trust. The converse of this rule will also hold: for the possession of the cestuique trust does not divest the legal estate from the trustee. A conveyance of the legal estate by the trustee, or, as lord Hardwicke seems to have thought^e, a disseisin or actual ouster of the trustee by the cestuique trust, may indeed be presumed from length of

^b See 1 Wm. Black. 182. *hend v. Townshend*, 1 Bro.

^c *Burgess v. Wheate*, 1 C. C. 551.

Wm. Black. 123. *Sandys' case*, Hard. 408. ^e 1 Ves. 435, 436. *in lord Portsmouth v. lord Effingham*. See *ibid.* 432.

^d Barn. 449. *Towns-*

possession, or, under particular circumstances; but time alone does not destroy the legal interest of the trustee.

SECT. IV.

In what cases trusts differ from legal estates.

As to a mere constructive trust, there is no doubt, that long acquiescence may bar the equitable claims of the cestuique trust^f; and it has often been determined, that a mortgagor may be deprived of his equity of redemption after a possession by the mortgagee for 20 years without any claim, or assertion of title, on the part of the mortgagor^g.

(4.) A fine levied by a trustee cannot prejudice the equitable interest of his *cestuique* trust, unless it be levied to a purchaser without notice^h; and as *cestuique* trust, entitled to the equitable inheritance, is considered at law merely as tenant at will to his trustee, a fine levied by him will not divest, or prejudice, the legal estateⁱ.

Of a fine and non-claim.

But where a term of years is assigned to a trustee to attend the inheritance, and the owner of the inheritance conveys by fine to a

^f See 17 Ves. 97. and the case of Bonny v. Ridgard there cited. Townshend v. Townshend, 1 Bro. C. C. 551. See also 17 Ves. 165.

^g 17 Ves. 99. Anon. 2 Atk. 383. Aggas v. Pic-

kerell, 3 Atk. 225. See Lake v. Thomas, 3 Ves. 17.

^h See Gilb. Cha. 62.

ⁱ See earl of Pomfret v. lord Windsor, 2 Ves. 472. 481.

Sect. IV.

In what cases
trusts differ
from legal es-
tates.

purchaser without notice of the term, it is said, that the non-claim upon the fine will bar the legal interest in the term^k. It is clear, however, that when the fine is levied to the use of the conuzor, or indeed to a purchaser, who takes an assignment of the outstanding term to a trustee named by himself, or where the term is antecedently charged, by way of security, with payment of a sum of money, the legal estate vested in the trustee would not be affected by the fine^l.

Terms attend-
ant upon the
inheritance.

(5.) Although the trust of a term of years in gross cannot be so limited, as to make it descendible as real estate; yet when the *cestuique trust* of the term is also the beneficial owner of the immediate inheritance in fee-simple, the term becomes consolidated with, or attendant upon, the inheritance. If the legal interest in a term of years becomes vested in the person legally entitled to the immediate reversionary freehold, the term becomes merged at law by the union: and by analogy to this rule, the Court of Chancery has determined, that where the owner of the legal estate of inheritance is entitled to the equitable interest in a term of years, of which the legal estate is vested in a trustee, and the

^k *Ischam v. Morris*, as cited 2 Vent. 329. 3 Bac. Ab. 448.

the cases upon these points collected in Bac. Ab. tit. "Leased and Terms for Years," (Q.) 3 vol. 448.

^l The reader will find all

term of years, if legally vested in the owner, and not in his trustee, would at law have become merged, the equitable interest in the term will become consolidated with the inheritance, and will follow the limitations of it^m; or, to use the expression of sir Matthew Haleⁿ, the equitable interest in the term "is no more than a shadow, an accessory" to the inheritance. It will belong to the heir or devisee^o; it will be real assets^p; it will, as against the heir^q or assignees of a bankrupt^r, be subject to dower, and for the same reason to curtesy; it will not be forfeited for the felony of *cestuique trust*^s; and it will not pass by a will; not attested by three witnesses^t.

SECT. IV.

In what cases trusts differ from legal estates.

A term may become attendant upon the inheritance, without any express declaration for that purpose, either where the legal interest in the term is vested in the trustee, and the legal freehold in the owner of the inheritance; or where the owner is beneficially or equitably entitled to the inheritance, and is legally possessed of the term, or where the legal estate,

^m Best v. Stamford, Prec.

Cha. 252. 2 Freem. 288.

ⁿ S. C.

^o Hard. 494.

^p 3 Cha. Rep. 37.

^q Ante 221.

^r Wray v. Williams, Prec.

Cha. 151. 1 P. W. 137.

^s 9 Vin. 227. pl. 80.

Squire v. Compton.

^t Attorney-general v.

Sandys, Hard. 488. 3

Cha. Rep. 33.

^u Whitechurch v. Whit-

church, 2 P. W. 236.

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

both of the term and the inheritance, is vested in trustees^u.

But although a term may become attendant upon the inheritance, the beneficial owner may destroy the equitable union^v. "A trust of a term, that follows the inheritance, may be resembled to a box of charters, which shall go to the heir with the lands; but if the owner grant them over, then they shall go to the executors of the grantee^z."

I have already stated, that when the equitable interest in the term is vested in the person, who is entitled to the immediate reversion in fee-simple, it is not necessary, that there should be an express declaration to make the term attendant upon the inheritance^z. The consolidation of the equitable interests arises from a rule of equity adopted for the protection of real property. It is difficult therefore to understand the ground, upon which the case of *Scott v. Fenhouillet*^a is said to have been determined. In that case, there appears to have been a legal interest of a few days dividing the term of years, upon which the question arose, from the inheritance; so that

^u See *Cooke v. Cooke*, 2 Atk. 67. and notes to the last edition. Collect. Jur. 273.

^v *Hayter v. Rod*, 1 P. W. 362. 1 Term Rep. 770.

^z Hard. 406.

^a See *Tiffin v. Tiffin*, 1 Vern. 1. *Dowse v. Derivall*, *ibid.* 104. *Goodright v. Sales*, 2 Wils. 329.

^z 1 Bro. Cha. Ca. 69.

if the legal interests of that term and of the inheritance had been united in one person, there would not have been a merger at law, on account of the intervening term; and lord Thurlow is reported to have said, that whether the term would, or would not, merge, an express declaration would make it attendant. Now if, in that case, the owner of the inheritance was entitled to the *beneficial* interest in the intervening, as well as in the other term, then he had a right to direct an assignment of both: and consequently, as he might, in that case, have caused the merger of them at law, the equitable interests must, according to the rule just noticed, have become attendant upon the inheritance, without the necessity of an express declaration. But if the beneficial, as well as the legal interest, in the intervening term, was outstanding in a third person, I am not aware of any rule of construction, upon which it can be admitted, that the express declaration of the parties could make the term attendant. Mr. Fearne*, in considering this case of *Scott v. Fenhouillet*, expressly states it to be his opinion, that, if there had been such intervening term, the declaration of the trust of the term to attend, could not have made it so: and his opinion was, no doubt, grounded upon the principles, which I have already stated; that the trust of a term,

SECT. IV.
In what cases trusts differ from legal estates.

* 2 Col. Jur. N° 5.

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

being governed by the same rules; as the limitation of the term itself at law^b, the parties cannot make it descendible, as real property, to the heir, except in the particular case, where, by analogy to the doctrine of merger at law, the courts of equity consolidate the equitable interest of the term with the inheritance. The author of the Treatise of Equity has properly observed (2 vol. 106.), "that a term attendant becomes in *gross*, when it is divided from the inheritance by *different limitations*. The trusts of a term in gross therefore can be limited no otherwise in equity, than the estate of a term in gross can be devised in law; for they are not for setting a rule of property in Chancery, other than that, which is the rule of property at law."

It is probable therefore, from the confused statement of the case of *Scott v. Fenhouillet* in *Brown*, that lord Thurlow's words are not correctly reported; for considering them as an authority, the doctrine, subversive of former principles, would be practically important in its application. Cases may be suggested: for instance, suppose an estate, subject to a beneficial lease, is settled upon A. for life, with remainder to his first and other sons successively in tail, with remainders over, with remainder to B. in fee: and that B., having

^b See 1 Vern. 164.

this remote reversion, purchases or acquires the prior lease, or term of years; if B., by any declaration, can make this term, or lease, attendant upon his reversionary inheritance, he may consequently convert it in equity into real, instead of personal, assets. This is indeed an extreme case; but in principle there can be no difference, whether the inheritance is divided from the term by an intervening interest of ten days, or of any greater term, or estate. If there is any difference in the extent of the intervening estate, what is the measure of it? Where is the boundary to be fixed?

Stat. IV.

In what cases trusts differ from legal estates.

It remains to be observed, that although a term be attendant in equity upon the inheritance, it is at law always considered as a term in gross: and therefore a person purchasing the inheritance, and taking an assignment of a satisfied term in the name of a trustee, will, by means of the term, protect himself against intervening incumbrances, of which he has no notice^c, and against the dower of the vendor's wife, notwithstanding he has notice of it^d. But in these cases, it is necessary,

^c See *Willoughby v. Willoughby*, 1 Term Rep. 763. *Goodtitle v. Jones*, 7 Term Rep. 47. But in the case of the *King v. Smith*, the judgment of which is reported by Mr. Sugden,

Vend. 536., a purchaser was not allowed to avail himself of the protection of a term against a debt due to the crown.

^d *Wynn v. Williams*, 5 Ves. 130. 134.

SECT. IV. that the purchaser should acquire the actual assignment of the term to his trustee*.

In what cases trusts differ from legal estates.

Conversion of real into personal estate, and personal into real estate.

(6.) Notwithstanding the words of limitation of a trust in fee-simple, or fee-tail, correspond with the construction of limitations of a legal estate, money may, in a court of equity, be impressed with the nature of real estate, and lands of inheritance may be converted into the nature of personal estate.

In the case of *Fletcher v. Ashburner*[†], sir Thomas Sewell observed, "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage-articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land

* *Maundrell v. Maundrell*, 7 Ves. 567. 10 Ves. 246.

† 1 Bro. C. C. 497.

"money, or money land. The cases esta-
 "blished this rule universally."

SECT. IV.

In what cases
 trusts differ
 from legal es-
 tates.

In the case of *Walker v. Denney*, lord Rosslyn thought, that there was no equity between the real and personal representatives upon the converted fund; but he thought, that the property was to be taken by the representatives in the state, in which it happened to be at the death of the party. But this doctrine is clearly erroneous. In *Wheldale v. Partridge*^b, lord Eldon said, "I am also disposed to say, notwithstanding the opinion of lord Rosslyn, in *Walker v. Denney*, and some other modern authorities, that if this instrument is to be taken to impress this fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly and plainly impressed with real uses as land, and one of those uses being for the benefit of the heir, the impression will remain for his benefit; and to put an end to that impression it must be shown, either that the money was in possession of a person, who had in himself both the heirs and executors, or he must do some act to denote a change of his intention, as to the devolution of the property upon either; and

^a 2 Ves. jun. 170. 176.

^b 8 Ves. 235. 5 Ves. 389. S. C.

Sect. IV. "it is not correct to say the court does not
 In what cases trusts differ from legal estates. "interpose between volunteers, if they give
 "to the executor that money, which the instrument has given to the heir." Several modern cases have established lord Eldon's opinion¹.

Money agreed or directed to be laid out in land, is for all the purposes, for which it is so agreed or directed to be laid out, considered as real estate: it will descend to the heir^k; it will be real assets to pay debts^l; it will be subject to curtesy^m, and it will pass by a devise of lands or hereditamentsⁿ.

So real estate under an absolute trust or direction to sell, is for all purposes considered as personal estate; and therefore, where an heir at law becomes entitled by way of resulting trust to a partial interest, under, or in consequence of, a conveyance or devise in trust

¹ See Thornton v. Hawley, 10 Ves. 129. Biddulph v. Biddulph, 12 Ves. 160. Kirkman v. Miles, 13 Ves. 338. Shard v. Shard, 14 Ves. 348.

^k Edwards v. countess of Warwick, 2 P. W. 171. Lechmere v. Carlisle, 3 P. W. 211. Cross v. Addenbroke, and Fulham v. Jones, 3 P. W. 221., note C.

^l Trelawney v. Booth, 2 Atk. 307. Whitwick v.

Jernain, cited in Baden v. Pembroke, 2 Vern. 58.

^m Sweetapple v. Bindon, 2 Vern. 536. Cunningham v. Moody, 1 Ves. 176.

ⁿ Lingen v. Sowray, 1 P. W. 172. Harvey v. Aston, 1 Atk. 364. Green v. Smith, ib. 572. and note. Beauclerk v. Mead, 2 Atk. 169. Guidot v. Guidot, 3 Atk. 253. Rashley v. Masters, 3 Bro. Ch. Rep. 99. Whitaker v. Whitaker, 4 Bro. Ch. Rep. 31.

to sell, the interest so resulting to him will be part of his personal estate^o. SECT. IV.

In what cases
trusts differ
from legal es-
tates.

The fund, which is to be converted, will continue to have the equitable quality, which it is ultimately to possess, until the conversion takes place, or until some person, becoming absolutely entitled to the beneficial interest, elects to take it in the shape, in which it then is. It frequently becomes a question, what act shall amount to an election; although very slight evidence of intention will be sufficient. In *Bradish v. Gee*^p, lord Hardwicke said, that he could not admit, that a parol declaration would amount to an election. When a person entitled to the fee-simple of an estate to be purchased with trust money, and without requiring the purchase to be completed, causes the securities for the money to be changed in the name of a trustee, in trust for himself, *his executors and administrators*^q; and where a person, entitled absolutely to the money to arise by the sale of real estate, makes a lease of the estate itself, reserving rent payable to him, *his heirs and assigns*^r: these circumstances have been considered to amount to an election.

^p *Hewitt v. Wright*, 1 Bro. C. C. 86. *Wright v. Wright*, 16 Ves. 188.
^q Amb. 229.

^r *Lingen v. Santay*, 1 P. W. 172.
^s *Crabtree v. Bramble*, 3 Atk. 680.

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

A feme covert having an absolute power of appointment over her separate property, is in respect of such property in the situation of a feme sole, and is consequently capable of making an election. But where a feme covert is entitled to real estate to be purchased with trust money, not subject to her appointment, she cannot, by a mere act of election, alter the nature of the fund: she must either cause the money to be invested in land for the purpose of levying a fine of it, or she must appear personally in the Court of Chancery for the purpose of consenting to take the money as personal estate: the latter mode being considered in equity as equivalent to a fine^a.

Connected with this subject, it may not be improper to observe, that where an estate is conveyed or devised to trustees in trust to sell, and to lay out the monies to arise by the sale in the purchase of other lands to be settled upon A. in tail, with remainder to him in fee; A. previously to the sale of the original estate, may by levying a fine of it, acquire the absolute beneficial interest in it in fee-simple, and thereby elect to take the estate directed to be sold, in lieu of that directed to be purchased^b.

^a *Oldham v. Hughes*, 2 Atk. 452.

^b *Pearson v. Lane*, 17 Ves. 191.

Neither an infant^a nor a trustee^b can elect to alter the nature of the fund.

SECT. IV:

In what cases trusts differ from legal estates.

When an estate is conveyed, or devised, to trustees in trust to sell, and to pay the monies to arise by the sale, among several persons, it is necessary, that all the *cestuisque trust* should concur in electing to take the original property as real estate; for none of the *cestuisque trust* can against, or without, the consent of any one of them, prevent the sale of the estate. This is a point of great importance in the consideration of titles; and as there is not much to be found in the books upon it, I have thought it necessary to add the following extracts of the opinions of sir Thomas Sewell and lord Hardwicke.

In Fletcher v. Ashburner^c, sir Thomas Sewell observes, that "where an estate is directed to be sold and the money divided among several persons, none has a right to say, that any part shall not be sold."

In Crabtree v. Brambley, lord Hardwicke says, that "no election could determine the question as to those claiming under the trust, but as to those only, who claim as

^a Carr v. Elliston, 2 Bro. Amb. 241.
C. C. 56. ^b 1 Bro. C. C. 497.
^c Earlom v. Saunders, ^d 3 Atk. 680.

SECT. IV.
In what cases
trusts differ
from legal es-
tates.

"volunteers:" and in *Bradish v. Gee**, there is the following passage: "In the present case, one tenant in common had consented to a decree for sale of the whole estate, and his lordship said he was bound by it; for the other parties were interested in that consent, because their shares of the estates would not sell so well separate, as if the whole was sold together; and his lordship said, even if he had afterwards petitioned, that the land should not be sold, yet the decree would not be varied, and the money arising by the sale would go to his personal representative."

It should seem to follow from these principles, that if A. devises a real estate in trust to be sold, and directs, that the money, which shall arise by the sale, shall be invested in the purchase of another estate to be conveyed to B. in fee-simple; and if before the sale B. dies, having bequeathed the monies to arise by the sale to C., and having appointed D. his executor, C. cannot by electing to take the devised property as real estate, prevent a sale of it against D., who, as executor, may require the money for payment of the testator's debts.

* *Amb. 229.*

(7.) When a lesser and a greater estate are united in the same person without any intervening interest in another, the lesser estate is, generally speaking, merged at the common law: and the extinguishment is effected by the mere union of the estates without the aid of intention, and even against it. But in equity the concurrence of beneficial interests, in the same person, does not alone consolidate them; and in some cases the courts of equity will relieve against the effects of a legal merger^a.

SECT. IV.

In what cases trusts differ from legal estates.
Equitable mergers.

A person, having an equitable lien upon an estate for the payment of a sum of money, and afterwards becoming entitled to the estate itself either for life, or in tail^b, is not, by the mere accession of the estate for life, or in tail, deprived of the benefit of his lien; for he has a partial interest in the estate, and an absolute right to the money: and there is no ground in equity to exonerate the estate from the lien in favour of the persons in remainder, or of the issue in tail, to the prejudice of the personal representatives of the tenant for life, or in tail.

But where a person is absolutely entitled to a sum of money charged upon an estate, and

^a See *Danby v. Danby*, Finch, 220. *Sanders v. Talbot*, 2 P. W. 604. 15 Bournford, *ibid.* 424. ^b *Duke of Chandos v. Talbot*, 2 P. W. 604. 15 Vin. 369. pl. 4.

SECT. IV.
In what cases
trusts differ
from legal es-
tates.

afterwards becomes entitled to the fee-simple of the estate, the Court of Chancery, in most cases, consolidates the rights by extinguishing the equitable lien. The rule however has two exceptions; the first in favour of creditors^c; and the second in favour of infancy, where the person, becoming entitled to the charge and the estate, dies during his minority, having by will disposed of the charge^d.

These points are well explained by lord Northington in *Donisthorpe and Wife v. Porter*^e. In that case Richard Porter settled estates to the use of himself for life, remainder to his wife for life, remainder to trustees for 100 years for raising 1000*l.* for portions of daughters and younger sons, with remainder to himself in fee.

Richard Porter died leaving one son and a daughter. The wife of Richard Porter also died; then the daughter died intestate, leaving Richard (who was entitled to the estate in fee-simple), her only brother, and next of kin. Richard the son died intestate, leaving Robert Porter, his heir at law, and Catherine wife of Donisthorpe (the plaintiff), his next of kin.

^c See 2 Vern. 208. *Compton v. Oxenden*, 2 Ves. J. 261.

^d *Chester v. Willis*, Amb.

246. *Powell v. Morgan*, 2 Vern. 90. *Thomas v. Keym*, 2 Vern. 348.

^e Amb. 600.

Donisthorpe and wife filed their bill against Robert Porter to have the 1000*l.* raised; and lord Northington, chancellor, said, "The question, whether the 1000*l.* ought to be raised, is a question of consequence. I do not find, that the counsel has cited a decision in point; yet on grounds of general practice, I am perhaps better satisfied, than I should be, if I depended on authorities. It is a case of consequence, because it may frequently happen in families. It might, if determined for the plaintiffs, revive dormant claims in families. I think cases of consolidating rights in equity are reducible to a solid foundation. I do not think it a rule, that a charge upon an estate, which can only be got at by trustees, and so not merge at law, shall be distinct in equity, and go to the administrator, whilst the estate goes to the heir. But I think, where the owner has an absolute interest in the estate and charge, the charge is annihilated for the benefit of the estate and heir. The court does not consider the subtleties of mergers; but discharges the estate from the incumbrance; it would otherwise burthen estates to no purpose. But there are two exceptions; 1st, the case of creditors arising from the power and justice of this court, correcting the liberality of law, with regard to creditors; viz. that a man may die insolvent leaving a

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

"very good estate:—2dly, of infants^f. As to
"mergers, courts of law cannot look into
"rights or beneficial interests. It merges es-
"tates lying in the same person, but cannot
"where they lie in different persons. Equity
"does not regard that, but looks into the be-
"neficial interests and views of the parties,
"whether the estates are strictly in the same
"person, or in different persons." The bill was
therefore dismissed.

Even in the case of infancy, it seems neces-
sary, in order to keep the charge on foot, that
the infant should manifest an intention, that
the charge should not merge^g: and upon this
principle, there is no equity in favour of the
personal representatives of a lunatic against
the heir to have a charge of this kind raised^h.

When a man marries an infant, entitled to
the fee-simple of an estate, and to a sum of
money charged upon it, and which becomes an
interest vested in the infant upon the event

^f In the case of lord
Compton v. Oxenden, 2
Ves. J. 261. the chancellor
said, the cases of infants
turn upon a *supposed intent*:
and that the court saw in
Thomas v. Keymiss, that it
was much more beneficial
to the *infant*, that it should
continue *personal*; because
the infant has the use and

disposition of that before
21; but he could have no
disposable interest in real
till that age.

^g See Powell v. Morgan,
and Thomas v. Keymiss,
supra; and Chester v. Wil-
lis, Amb. 246.

^h Compton v. Oxenden,
supra.

of the marriage, it should seem, that the charge would not merge to the prejudice of the husband.

SECT. IV.

In what cases trusts differ from legal estates.

Upon a case, where two daughters were presumptively entitled to a sum of money, raisable under the trusts of a term of years, and which was to become vested in them at the age of twenty-one, or marriage, and the fee-simple descended upon them before the portions became vested, and afterwards one of the daughters married under twenty-one, and the other married, having attained that age, the late Mr. Fearne¹ thought "that after the descent, each daughter might be considered as entitled to one moiety of the lands, and to a charge of one moiety of her portion out of the other moiety of the lands; and although as such charges were equal and reciprocal, they may be said to have countervailed and discharged each other, yet, considering that such a conclusion would be in prejudice to the rights of third persons, viz. their husbands, who would have been entitled to such portions, it was not to be relied on."

But Mr. Fearne's opinion, as to the charge of each daughter upon the other's moiety, is not tenable; for in the arrangement of equi-

¹ Opinion dated 1784.

SECT. IV.

In what cases
trusts differ
from legal es-
tates.

table rights, it is a principle of the Court of Chancery to avoid circuitry. In fact, the point had previously received a determination in the case of *Stephens v. lord Bateman*^k.

SECT. V.

Trusts exe-
cuted, and
trusts execu-
tory.

V. There is a distinction between a trust executed, and a trust executory. When an estate is conveyed to the use of A. and his heirs, with a simple declaration of the trust for B. and his heirs, or the heirs of his body, the trust is perfect; and it is said to be executed, because no further act is necessary to be done by the trustee to raise and give effect to it; and, because there is no ground for the interference of a court of equity to affix a meaning to the words, declaratory of the trust, which they do not legally import.

But in the case of articles of agreement, made in contemplation of marriage, and which are consequently preparatory to a settlement, and in the case of those wills, which are merely directory of a subsequent conveyance, the trusts declared by them are said to be executory, because they require an ulterior

^k 1 Bro. Cha. Ca. 22. It must be observed, that if Mrs. Stephens, in this case, had a charge upon her sister's moiety, for a moiety of her (Mrs. Stephens') portion, then the settlement by Mr. and Mrs. Stephens of her moiety of the estate, would have been no extinguishment of that moiety of her portion, which was charged upon her sister's moiety of the estate.

act to raise and perfect them. They are rather considered as instructions for settlements, than as instruments in themselves complete: and the Court of Chancery, in order to promote the presumed views of the parties in the one case, and to support the manifest intention of the testator in the other, will attach to the words, expressive of the trusts, a more liberal and enlarged construction, than they would admit, if applied either to the limitation of a legal estate, or a trust executed.

Sect. V.
Trusts executed, and trusts executory.

It has before been observed, that words of limitation, applicable to trusts executed, correspond with the limitations of legal estates. But in a marriage-agreement, directory of a settlement, the words, "heirs of the body," will be considered as words of purchase, and will authorize a limitation in strict settlement to the first and other sons successively in tail; for it would be inconsistent with the nature of the transaction, and would defeat the objects of the articles, if, by construing those words as words of limitation, an estate tail were limited to the husband, which he might immediately afterwards defeat¹.

¹ See *Jones v. Langhton*, 1 Eq. Ab. 392. *Nandick v. Wilks*, *ibid.* 393. *Streatfield v. Streatfield*, Ca. Temp. Talb. 176. See also *Trevor v. Trevor*, 1 P. W. 622. *Cusack v. Cusack*, 5 Bro. Par. Ca. 116. ed. 1803. It should seem, that where by articles the husband's estate is agreed to be settled upon the intended

Sect. V.
Trusts executed, and trusts executory.

In wills, raising executory trusts, words of limitation, as "heirs of the body," will be converted into words of purchase, if the testator has, by some expression, manifested an intention, that they should not be construed in the former sense: as where a testator, having, by will, directed an estate to be settled upon A. and the heirs of his body, explains the extent of the gift to A. by declaring, that he shall be tenant for life without impeachment of waste^m; or, that there shall be trustees to preserve contingent remaindersⁿ; or, that the heirs of the body shall take "in succession and priority^o;" or, "as counsel shall advise^p;" or, that the settlement upon A. shall be made "at the discretion of the trustees^q;" or, that the settlement shall be so made, that A. shall not be empowered "to dock the entail^r;" or, that the settlement shall be made upon A. (being a feme covert) "for her separate use" for life^s.

wife, "and the heirs of her "body," the court will not order it to be settled otherwise: for the estate being *ex provisione viri*, it is protected from the alienation of the tenant in tail by the statute 11 Hen. 7. See *Green v. Ekins*, 2 Atk. 473. *Honor v. Honor*, 1 P. W. 123. *Whately v. Kemp*, 2 Ves. 358.

^m *Glenorchy v. Boswell*, Ca. Temp. Talb. 3. 19.

ⁿ *Papillon v. Voice*, 2 P. W. 471. *Bagshaw v. Spencer*, 2 Atk. 570. 581.

^o *White v. Carter*, Amb. 670.

^p *Bastard v. Proby*, cited by Mr. Cox, 3 P. W. 478.

^q *Read v. Snell*, 2 Atk. 642.

^r *Leonard v. earl of Sussex*, 2 Vern. 526.

^s *Roberts v. Dixwell*, 1 Atk. 607.

But to authorize this latitude of construction in the case of wills, the intention of the testator must appear¹; and, therefore, under a simple direction to convey an estate to A. and the heirs of his body, A. will be entitled to an estate tail².

Sect. V.
Trusts executed, and trusts executory.

The ground, therefore, of construction respecting words of limitation, differs in wills and marriage-articles: in wills, it is the intention of the testator manifestly appearing; and in articles, the nature of the transaction, and the presumed objects of the parties.

The late Mr. Fearn³ thought, that a power of selling, not expressly authorized by marriage-articles, might be introduced into a settlement made in pursuance of them, and would be supported in equity: but it has been decided in a late case of a will⁴, that the introduction of a power of selling in a settlement, was not authorized, when the will was silent as to the power.

In the execution of an executory trust the court will direct a limitation to be inserted in the settlement to preserve contingent re-

¹ See *Stanley v. Stanley*, 16 Ves. 491. Coleman, ib. 142. 2 P. W. 474.

² See *Legate v. Sewell*, 1 P. W. 87. 90. Ball v.

³ *Posth. Works*, 309.

⁴ *Wheate v. Hall*, 17 Ves.

SECT. V.
Trusts executed, and trusts executory.

mainders^y; and both in wills^z and marriage-articles^a, cross remainders may be raised by implication.

In the case of the duke of Newcastle v. Lincoln^b, a conveyance was made before, and in consideration of, marriage, of real estates in strict settlement, with a covenant to assign leasehold estates to trustees, "in trust for such person or persons, and for such, or the like, ends, intents, and purposes as are thereinbefore mentioned of and concerning the said castles, &c., as far as the law would in that case permit;" and lord Rosslyn thought, that the settlement should be so framed, that no person, being tenant in tail by purchase, should become entitled to a vested interest in the leasehold estate, until he attained twenty-one, or, dying under that age, unless he left issue inheritable to the intail.

(208.)

SECT. VI.

Of the declaration of trusts pursuant to stat. 29 Car. 2. c. 3. sec. 7.

VI. To prevent the inconveniences, which arose from parol declarations, and secret transfers of uses, the statute 29 Car. 2. c. 3. s. 7. requires, that "all declarations or creations

^y Baskerville v. Baskerville, 2 Atk. 279. Stamford v. Hobart, 3 Bro. Par. Ca. 31. ed. 1803.

^z Green v. Stephens, 12 Ves. 419. 17 Ves. 64. Marryatt v. Townley, 1 Ves. 102. 104.

^a Twisden v. Lock, Amb. 663. Duke of Richmond v. lord Cadogan, cited 17 Ves. 67. West v. Erissey, 2 P. W. 349.

^b 3 Ves. 387. 12 Ves. 218. See also Gower v. Grosvenor, Barn. 54.

" of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing:" and by the ninth section, " that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise."

SECT. VI.

Of the declaration of trusts pursuant to stat. 29 Car. 2 c. 3. sec. 7.

This statute, it is said, does not extend to the declaration or creation of trusts of mere personalty^c.

(1.) There is no regular form prescribed by the courts of equity for the declaration or creation of the trust. Therefore a note, or memorandum in writing, from a trustee, promising to execute a declaration of trusts^d, or confessing, that he purchased lands with another man's money^e; or a bond from a trustee, either to perform the trusts of a conveyance, in which no trusts are mentioned^f, or to make an assignment, as his cestuique trust shall direct^g; a recital in a purchase-

In respect to the form of the declaration.

(209.)

^c See Nab v. Nab, 10 Mod. 404. Fordyce v. Willis, 3 Bro. Cha. Ca. 587.

^d Bellamy v. Burrow, Ca. Temp. Talb. 97.

^e Lane v. Dighton, Amb. 409. See Ambrose v. Am-

brose, 1 P. W. 322. Ryall v. Ryall, 1 Atk. 59.

^f Goodwin v. Cutler, Finch, 356.

^g Moorcroft v. Dowding, 2 P. W. 314.

SECT. VI.
Of the declaration of trusts pursuant to stat. 29 Car. 2. c. 3. sec. 7.

deed, that the consideration-money belonged to a third person^h, an answer in chancery, confessing a trustⁱ; a letter from a trustee disclosing the purposes of a devise to him^k; these, and indeed any writing in the shape of mutual covenants or articles of agreement^l relative to the transfer or produce of land, (210.) although without seal or stamp^m, if they properly discover the intention of the parties, are sufficient, in a court of equity, to create trusts.

In respect to the words of the declaration.

(2.) As there is no regular form for a declaration, so there is no particular set of words, nor mode of expression, prescribed by the statute, or adopted by the courts of equity, for the purpose of raising trusts. It has, therefore, been repeatedly decided, that any words in a will, intimating, or in the nature of a request, wish, desire, recommendation &c., are sufficient to create a trust, if the object of the gift, and the gift itself, can be correctly ascertainedⁿ. But if the certainty

^h *Kirk v. Webb*, Prec. Ch. 84. *Deg v. Deg*, 2 P. W. 415. *Ryall v. Ryall*, 1 Atk. 59.

ⁱ *Hampton v. Spencer*, 2 Vern. 288. *Cottington v. Fletcher*, 2 Atk. 155.

^k *Crooke v. Brookeing*, 2 Vern. 106.

^l *Legard v. Hodges*, 3 Bro. Cha. Ca. 531.

^m *Hodsdon v. Lloyd*, 2 Bro. Cha. Ca. 534.

ⁿ *Eales v. England*, Prec. Ch. 200. 2 Vin. 466. S. C. 1 Eq. Ab. 297. pl. 3. S. C. *Cloudsley v. Pelham*, 1 Vern. 411. *Jones v. Nabbs*, 1 Eq. Ab. 404. pl. 3. *Richardson v. Chapman*, 1 Burn Eccl. Law, 225. *Vernon v. Vernon*, Amb. 3. 2 Bro. Cha. Ca. 227. S. C. cited. *Clifton v. Lombe*, Amb. 519. *Massey v. Sherman*, Amb. 520. *Nowlan v.*

of the gift and object fail, then the trust must also fail, although the intention to create it should appear evident upon the face of the will^o.

SECT. VI.

Of the declaration of trusts pursuant to stat. 29 Car. 2. c. 3. sec. 7.

(3.) When an estate is vested in trustees in fee-simple, in trust to raise a sum of money, without specifying the particular mode of raising it, the trust will authorize a sale^r; and as a devise of the "*rents and profits*" of an estate will, at law, carry the land itself, it has been determined, that a trust to raise money by "*rents and profits*," will empower the trustees to sell^q, unless there are some words to restrain the sense of those words to "*annual*" profits^r.

As to the effect and construction of particular words; such as "*rents and profits*."

Melligan, 1 Bro. Cha. Ca. 489. Pierson v. Garnett, 2 Bro. Cha. Ca. 38. 226. Finch Prec. Ch. 200. in note, S. C. Davis v. King, 2 Bro. Cha. Ca. 600.

^o Harding v. Glyn, 1 Atk. 469. Le Maitre v. Bannister, 2 Bro. Cha. Ca. 40. cited Finch Prec. Ch. 201. S. C. Bland v. Bland, 2 Bro. Cha. Ca. 48. cited Finch Prec. Ch. S. C. Harland v. Trigg, 1 Bro. Cha. Ca. 142. Wynne v. Hawkins, 1 Bro. Cha. Ca. 180. Sprange v. Bernard, 2 Bro. Cha. Ca. 585. Note the case of Cunliffe v. Cunliffe, Amb. 686. Finch Prec. Ch. 201. S. C. 2 Bro. Cha. Ca. 42. S. C. was over-

ruled by the Master of the Rolls in the case of Pierson v. Garnett, 2 Bro. Cha. Ca. cited supra. See 2 Bro. Cha. Ca. 46. Hill v. Bishop of London, 1 Atk. 620.

^r Baines v. Dixon, 1 Ves. 41. Wareham v. Brown, 2 Vern. 153. Newman v. Johnson, 1 Vern. 45. See 8 Vin. 461. pl. 7, 8. notes.

^q Gibson v. Rogers, Amb. 93. 8 Vin. 461. pl. 7, 8, 9, 10, 11. Lingen v. Foley, 2 Cha. Ca. 205.

^r Ivy v. Gilbert, 2 P. W. 13. Evelyn v. Evelyn, 2 P. W. 666. Mills v. Banks, 3 P. W. 8. Anon. Vern. 104. Green v. Belcher, 1 Atk. 506.

SECT. VI. In the anonymous case 1 Vern. 104. a distinction is taken between a deed and a will, as to the operation of the words "rents and profits:" but there does not appear to be any ground for this distinction¹.

Of the declaration of trusts pursuant to stat. 29 Car. 2. c. 3. sec. 7.

SECT. VII. VII. By the eighth section of the statute 29 Car. 2. c. 3., it is provided, "that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of the law, or be transferred or extinguished by an act or operation of law, then and in any such case, such trust or confidence shall be of the like force and effect, as the same would have been, if this statute had not been made."

Resulting and constructive trusts.

In the case of *Lamplugh v. Lamplugh*², it was said, that this section must relate to trusts and equitable interests, and cannot relate to a use, which is a legal estate: and it is observable, that parol evidence may be admitted to rebut a resulting trust³.

The following are instances of trusts, arising from the operation or construction of equity.

¹ See *Trafford v. Ashton*, 1 P. W. 418. ² 2 Vern. 204. 1 P. W. 112.
³ 1 P. W. 112.

(1.) When an estate is subject to trust or equitable interest, and a person purchases it for a valuable consideration with notice of the trust or equitable interest, the estate will be subject to it in the hands of the purchaser^w; and a person acquiring an estate as a mere voluntary grantee, even without notice^x, or as a devisee^y, will take it subject to every beneficial or equitable lien. The principle has been extended to that equitable lien, which a vendor has for any part of his purchase-money remaining unpaid^z.

SECT. VII.

Resulting and constructive trusts.

Constructive trust arising from notice.

In the application of the above rule, it has been determined, that notice of a bargain and sale not inrolled^a, of a deed not registered^b, and of a judgment not docketed^c, will affect the purchaser: the Court of Chancery thereby giving an equitable validity to an instrument, which, the legislature has expressly declared, shall have no legal operation against a purchaser.

But a person purchasing with notice of a voluntary conveyance under the statute 27

^w *Saunders v. Dehew*, 2 Vern. 271. *Langton v. Astrey*, 2 Cha. Rep. 30. 3 Atk. 238. *Daniels v. Davison*, 16 Ves. 249.

^x See 1 Co. 121. b. *Pye v. George*, 2 Salk. 680.

^y *Marlow v. Smith*, 2 F.

W. 200.

^z *Mackreth v. Symmons*, 15 Ves. 329.

^a 3 Atk. 651, 652.

^b *Le Neve v. Le Neve*, 3 Atk. 646.

^c *Davis v. earl of Strathmore*, 16 Ves. 419.

SECT. VII.
Resulting and
constructive
trusts.

Eliz. c. 4. will not be bound by it^d; for the statute makes the voluntary conveyance constructively fraudulent; and the purchaser, buying with notice of a fraud, is not by the means of that notice converted into a trustee.

If a person purchases of a trustee for a valuable consideration without notice, he will hold discharged of the trust; but if the original trustee repurchases the estate, he will be again converted into a trustee, notwithstanding the first purchaser had levied a fine, and five years non-claim had run upon it^e. But a stranger, who purchases with notice from a person, who purchased for a valuable consideration without notice, may, it is conceived, shelter himself under the first purchase^f.

It is not clear, how far a purchaser may be affected by notice of a constructive or doubtful trust. It is to be lamented, that he is subject to it in any case. Where a settlement was made in pursuance of articles, and pursuing the exact words of the articles, gave an estate tail to the husband, instead of limiting the estate to him for life, with re-

^d See *Doe ex dem. Otley v. Manning*, 9 East, 59.

^e *Bovey v. Smith*, 1 Vern. 60. 2 Ch. Ca, 124. S. C.

^f See *Lowther v. Carlton*, 2 Atk. 242. and the cases in the note to the last ed.

mainder to his first and other sons in strict settlement, it was determined, that a purchaser with notice of the articles (which were of long standing), would not be affected by reason of the notice, with a trust for the benefit of the issue^s; and in the case of *Cordwell v. Mackaril*^h, the Chancellor says, "I am unwilling to think, that the subjects are bound to take notice of the rules of equity, as they are of a court of law. They must take notice of a deed, on which an equity arises, supported by precedents, the justice of which every body must acknowledge, as prior incumbrances, but not the mere construction of words, which are uncertain in themselves, and often depend on the locality of themⁱ."

SECT. VII.

Resulting and constructive trusts.

(2.) If an estate be purchased in the name of one person, and the consideration-money belong to, or be paid by, another, the estate so purchased, will be subject to a trust in favour of the person claiming, or paying, the

(212.)

Of resulting trusts.

Where an estate is purchased in the name of one, and the consideration-money paid by another person.

^s See *Warwick v. Warwick*, 3 Atk. 293. *Senhouse v. Earle*, Amb. 285. In the case of *Parker v. Brooke*, 9 Ves. 583. the Master of the Rolls, alluding to the last-mentioned case, said, that "Lord Hardwicke took it to be

"clear, that if the articles had been modern, he must have reformed them even against a purchaser."

^h Amb. 515.ⁱ See *Hardy v. Reeves*, 5 Ves. 426.

SECT. VII. money; although there be no express declaration for that purpose ^k.
 Resulting and constructive trusts.

(213.) In order to raise a trust of this kind, the fact of the ownership of the money should appear upon the face of the deed, either by a recital, or by expressions, which amount to a necessary implication, or presumptive proof of it^l. If, however, it be expressly stated in the conveyance, that the money was paid by the nominal purchaser, and nothing shall appear to explain the nature of the transaction, then, if in his lifetime, such nominal purchaser shall, by any note or memorandum in writing ^m, or by his answer to a bill filed against him, for a recovery thereof (though he shall at the same time plead the statute of frauds ⁿ), confess the purpose, for which the purchase was made; or if, after his death, he shall leave any papers disclosing the real circumstances of the case^o; in all these instances the court will raise the trust, even against the express declaration of the pur-

^k Lloyd v. Spillet, 2 Atk. 150. 257. 1 Atk. 60. 1 Vern. 366. 4 Bro. P. C. 67. But according to the policy of the registry acts (26 Geo. 3. c. 60. 34 Geo. 3. c. 68.), the registry of a ship is conclusive evidence of the equitable, as well as legal, property, *Ex parte* Houghton, 17 Ves. 251.

^l See 2 Vern. 168. Prec.

Ch. 104. Kirk v. Webb, ib. 84.

^m See ante, 251. and O'Hara v. O'Neil, 2 Eq. Ab. 745. and Vin. tit. Trust (E.)

ⁿ Cottingham v. Fletcher, 2 Atk. 155. But see Edwards v. Moore, 4 Ves. 23.

^o Ryall v. Ryall, Amb. 413. Lane v. Dighton, ib. 409.

chase-deed. If, indeed, upon a bill filed Sacr. VII.
 against him for a discovery, the nominal pur- Resulting and
 constructive
 trusts.
 chaser deny the facts by his answer, and in-
 sist upon the statute of frauds, it should seem
 that parol proof cannot be admitted to prove
 the trust^p: and it is conceived, that after the
 death of the supposed nominal purchaser,
 parol proof alone, can in no instance be ad-
 mitted against the express declaration of the
 deed^q. The cases of *Ryall v. Ryall*^r, and
Lane v. Dighton^s, are by no means authori-
 ties against this construction; for, as to the
 former, it will be found, upon examining
 Mr. Ambler's report of it^t, that the inquiry
 was directed only as to 250*l.* which appeared
 by papers of the testator, to have been trust-
 money: and as to the latter, there was evi-
 dence in the case under Mr. Dighton's hand-
 writing, that the trust stocks had been sold,
 and the money laid out from time to time in
 the purchase of land.

The preceding observations have been
 adopted by one intelligent writer^u, and they

^p See *Skett v. Whitmore*,
 2 Freem. 852. *Newton v.*
Preston, Prec. Ch. 103.
Willis v. Willis, 2 Atk. 71.
Cooth v. Jackson, 4 Ves.
 12. *Rowe v. Teed*, 15 Ves.
 374.
^q *Kirk v. Webb*, Prec.
 Ch. 84. 2 Freem. 229. S.
 C. *Heron v. Heron*, Prec.

Ch. 163. *Halcot v. Mark-*
ant, ib. 168. *Kinder v.*
Müller, ib. 172. 2 Vern.
 440. S. C. *Deg v. Deg*, 2
 P. W. 414.
^r 1 Atk. 59.
^s Amb. 409.
^t Amb. 413. S. C. cited.
^u *Roberts on Frauds*, 99.

SECT. VII.
Resulting and
constructive
trusts.

have been controverted by another^{*}, upon the ground, "that the statute of frauds is not more broken in upon by admitting parol proof after the death of the nominal purchaser, than by allowing such proof in his lifetime." The question, however, will still be, whether the parol evidence of third persons can be admitted during the purchaser's life against his own express declaration. When upon the face of the instrument, or by other written evidence, it appears, that the consideration paid by the grantee is the property of another person, there is an equitable presumption, that the estate is purchased for the benefit of the person, with whose money it was bought; and this resulting trust so created by a construction of equity, may be rebutted by parol evidence; for the trust itself, not being within the statute of frauds, may be repelled or varied without the aid of it^{*}. But it is difficult to discover a principle, upon which parol evidence alone can, consistently with the statute, be admitted to establish a fact, the effect of which, if established, is to create an equitable interest, and not to counteract a constructive trust previously raised[†].

^{*} Sugden on Vend. 415, 416.

^{*} See *Lamplugh v. Lamplugh*, 1 P. W. 113. *Taylor v. Alston*, cited in *Dyer v. Dyer*, Watk. 223.

[†] If the case of *Lench v.*

Lench, 10 Ves. 511. is to be considered as an unqualified decision, establishing the admission of parol evidence alone, I must in course bow to the authority

The rule, which I have explained, is not applicable to the case of a purchase made by a father in the name of a son, unprovided for at the time of such purchase: for in that case the purchase shall be considered as an advancement for the son, and not as a trust for the father; although the father takes the possession, and receives the rents and profits^a. It is the same, where the grandfather purchases lands in the name of a grandchild, the father being dead; for then the grandfather is *in loco parentis*^a.

SECT. VII.

Resulting and constructive trusts.

The exceptions to the rule.

Purchase by a father.

In these cases, the father cannot by a subsequent deed, declare his son to be a trustee^b; nor can the son himself, on his sick bed, make

(215.)

^a Gray v. Gray, 1 Eq. Ab. 381. Taylor v. Taylor, 1 Atk. 386. 1 P. W. 111. 608. 2 Atk. 480. In Gilbert's Lex Prætoria (271.) it is said, "but if the father purchases in the name of his son, who is of full age, which, by our law, is an emancipation out of the power of the father, there if the father takes the profits, or lets leases, or acts as the owner of the estate, the son is a trustee for the father; because there is the same resulting trust, as if the son were a stranger, where the father acts as owner of the estate, since it was pur-

"chased with his money." See Treatise of Eq. 2 vol. 122.

^a Ebrand v. Dancer, 1 Eq. Ab. 382. So if a person purchase in the name of his wife, the wife is not a trustee for her husband. Kingdom v. Bridges, 2 Vern. 67. Back v. Andrews, Prec. Cha. 1. 2 Vern. 120. So where a father purchases a copyhold estate, held for lives, and takes the grant in the names of himself and his son in succession. The cases upon this head will be found in Dyer v. Dyer, Watk. 216. Finch v. Finch, 15 Ves. 43.

^b 2 Cha. Ca. 231.

SECT. VII. a declaration of trust in favour of his father, so as to prevent his own wife from dower^c.
 Resulting and constructive trusts.

So if a father buy in the names of his son and a trustee^d, or in the names of himself and son^e, in either case it is an advancement. But in these instances, the father shall have the benefit of survivorship in case the son die during his minority: although the son shall not have the benefit of survivorship, as against the judgment creditor of the father^f.

(216.) It seems, that when the son is provided for at the time of the purchase, he stands merely in the situation of a stranger^g. Where a grandmother, during the life of the father, invested 100*l.* in the purchase of an exchequer annuity in the name of a grandchild; the child's father gave a bond to the grandmother for the repayment of 100*l.* if the child died before the grandmother; the grandmother received the income, and kept the tally, the grandchild making no claim; it was held to be a trust for the grandmother^h.

^c *Bateman v. Bateman*, 2 Vern. 406.

^d *Lamplugh v. Lamplugh*, 1 P. W. 111.

^e *Scroope v. Scroope*, 1 Cha. Ca. 27. *Back v. Andrews*, 2 Vern. 120.

^f *Stileman v. Ashdown*, 2 Atk. 477.

^g *Elliot v. Elliot*, 2 Cha. Ca. 232.

^h *Lloyd v. Read*, 1 P. W. 607.

(3.) When a voluntary conveyance is made with a declaration of trust, as to a part only of the land, or of the estate or interest in it, there is a resulting trust, in that case, for the grantor or his representatives, as to the part, or interest, of which there is no declarationⁱ: as where A. granted an advowson to B. for 99 years in trust to present a particular person, the beneficial interest in the term, beyond the purpose, for which the grant was made, vested in the grantor^k.

Sect. VII.

Resulting and constructive trusts.

Where the express declaration of the trust extends to a part of the land or interest.

The rule is applicable to devises. Where a testator creates an executory trust, or devise, to take effect within the limit allowed by law, and makes no disposition of the intermediate beneficial interest, the trust or equitable estate will descend to the heir, until the contingency happens, upon which the equitable executory devise is to arise: or, where the legal estate in fee-simple is devised to trustees, in trust for A. for life, with remainder to his first and other sons successively in tail, with remainder to the first and other sons of B. successively in tail, and A. dies without having had a son in the lifetime of B., who has no son then living; the legal estate of the trustees will support the contingent remainder to the sons of B.; and until the birth of B.'s son, or until

ⁱ Barn. Cha. Rep. 308. 2 Atk. 150.^k *Cottington v. Fletcher*, 2 Atk. 156.

SECT. VII.
Resulting and
constructive
trusts.

such event becomes impossible by the death of B., the beneficial interest will descend to the testator's heir¹.

Within this rule may be included that class of cases, where a trust is created by deed or will for a particular purpose, and there is no further declaration of the trust^m; as where lands are devised to executors for payment of debts and legacies, and no further trust is declared, the executors, after the payment of debts and legacies, will be trustees, as to the surplus for the heir at lawⁿ, although the executors have no legacy, and the heir has an express one^o. So where A. devised lands to trustees to sell, and to dispose of the money as he should appoint, and provided he left no paper of appointment, to his four nephews; A. appointed several sums to be paid to several persons, which sums did not amount to the value of the lands; and it was determined, that the surplus resulted to the heir^p.

¹ *Hopkins v. Hopkins*, 1 Atk. 581. Ca. Temp. Talb. 44. Butl. Co. Litt. 271. b. *S. C. Stanley v. Stanley*, 16 Ves. 491.

^m See *Cook v. Guavas*, cited 2 Vern. 645. and the cases cited in the note to *Hill v. bishop of London*, 1 Atk. 619. last ed. In *Davidson v. Foley*, 2 Bro. C. C. 203., the trust of a

term of years, created for particular purposes, resulted for the benefit of the tenant for life, in remainder expectant upon the term.

ⁿ *Countess of Bristol v. Hungerford*, 2 Vern. 645.

^o *Starkey v. Brookes*, 1 P. W. 390.

^p *City of London v. Garway*, 2 Vern. 571.

So where a rent-charge was devised to be sold to pay legacies to the amount of 800*l.*; but if the rent-charge sold for 1000*l.*, then an additional legacy of 100*l.* was given to B., and another of 100*l.* was given to C.: it was held, in this case, that if the rent-charge sold for above 800*l.*, and less than 1000*l.*, the residue above 800*l.* would result to the heir at law^a. Upon the same principle, the case of *Digby v. Legard*, was determined^r. E. B. devised her real and personal estates to trustees, in trust to sell and pay debts, and to pay the residue to five persons, to be equally divided among them, share and share alike (which words in a will, create a tenancy in common); one of the residuary legatees died in the lifetime of the testatrix; and the court decided, that this was a resulting trust (as to the share in the real estate of the residuary legatee, who died in the testator's lifetime), for the benefit of the heir at law.

SECT. VII.

Resulting and constructive trusts.

The general rule, which I have mentioned, that when lands are devised for a particular purpose, viz. to be sold for payment of debts, &c. there is a resulting trust for the heir at law, admits, however, of several exceptions^s.

^a *Stonehouse v. Evelyn*, W. 22.^s P. W. 251.^r See note to 1 Atk. 619.^t Note 1. 3 Cox's P. 3 ed.

SECT. VII.

Resulting and
constructive
trusts.

In *Hill v. Bishop of London*^t, lord Hardwicke observed, that if J. S. devised lands to A. to sell them to B., for the particular advantage of B.; that advantage was the only purpose to be served according to the intent of the testator; and to be satisfied by the mere act of selling, let the money go where it would; and that there was no precedent of a resulting trust in such a case: and that if A. devised lands to J. S. to sell for the best price to B., or to lease for three years, at such a fine, there could be no resulting trust to the heir of the testator. In a case^u where there was a devise, by a codicil, to trustees to sell, and to dispose of the money arising by the sale to such uses and for such purposes, as the testator should appoint, and in default of appointment, as they (the trustees) or the major part of them, should think proper; the testator having previously devised these lands to the same trustees, for such charitable uses as he should direct by codicil or otherwise; the testator made no appointment: the trustees insisted upon the beneficial interest in the lands devised; and the heir at law claimed a resulting trust; but it was determined, that there should be no resulting trust for the heir; nor could the trustees have any beneficial interest; for that it clearly appeared,

^t 1 Atk. 618.

^u *Cook v. Duckenfield*,
2 Atk. 562.

that the testator intended them no benefit, but only an authority ^{v.}

SECT. VII.

Resulting and constructive trusts.

It has been before stated, that if there be no consideration expressed in a common law conveyance, and no declaration of the use, the use will result to the grantor. But it is here necessary to observe, that the mere want of a valuable consideration will not alone create a resulting trust in favour of the grantor, or his representatives. Lord Hardwicke, in the case of *Lloyd v. Spillet*, expressly made his decision upon this distinction between a use and a trust arising by operation of law ^x. In fact, if the mere want of a consideration would create a resulting trust, there could be no such thing as a voluntary conveyance, so as to vest a beneficial interest in the grantee. Circumstances of fraud, mistake, or the like ^y, may convert a grantee under a voluntary conveyance, into a trustee: but not the mere want of a valuable consideration. (217.)

(4.) When a trustee or guardian renews a lease, the new lease shall be subject to the

Renewal of a lease by a trustee, guardian, or tenant for life.

^v To the cases, which I have cited as an exemplification of the rule, and its exceptions, I may add the more recent cases of *Attorney-general v. Wansey*, 15 Ves. 231. *Dawson v. Clarke*, 15 Ves. 409. *Wright v. Wright*, 16 Ves. 188. *Nash v. Smith*, 17

Ves. 29. Sheddon v. Goodrich, 8 Ves. 481. *Williams v. Coade*, 10 Ves. 500.

^x *Barn. Ch. Rep.* 387, 388. 2 *Atk.* 150.

^y See 1 *Freem.* 305. 308. 2 *Atk.* 150. *Duke of Norfolk v. Browne*, *Prec. Cha.* 80.

SECT. VII.
Resulting and
constructive
trusts.

- (218.) trust affecting the old lease^a; and if a lease be settled upon A. for life, with remainders over, and A. obtains a renewal of the lease, the renewed lease shall be bound by the trusts of the will or settlement^a. So if one of three lessees, under a lease from a dean and chapter, surrender the old lease, and take a new lease to himself, it shall be a trust for all of them^b. In these cases, the rule of equity is enforced even against the express intention and contract of the lessor^c.

It is observable, that the rule has been adopted by the legislature in several statutes relating to the redemption and purchase of land-tax^d.

^a Holt v. Holt, 1 Cha. Ca. 191. Pierson v. Shore, 1 Atk. 480. Abney v. Miller, 2 Atk. 597. Edwards v. Lewis, 3 Atk. 538. Featherstonhaugh v. Fenwick, 17 Ves. 298.

^a Taster v. Marriott, Amb. 668. Raw v. Chichester, *ibid.* 715. Owen v. Williams, *ibid.* 734. Pickering v. Vowles, 1 Bro. 197. Coppin v. Fernyhough, 2 Bro. 291. Killick v. Flexney, 4 Bro. 161. James v. Dean, 11 Ves. 883. 15 Ves. 236.

^b Palmer v. Young, 1 Vern. 276. In this case it should seem, that the surrender of one joint tenant was considered as binding against the others. But this is at least doubtful. In

Reed v. Tucker, Cro. Eliz. 302., it is said, "that every act by one joint tenant for the benefit of his companion, shall bind; but those acts which prejudice his companion in estate shall not bind; as the surrender of the one."

^c Keech v. Sandford, Sel. Ca. Cha. 61.

^d See 39 G. 3. c. 108. sec. 8. 42 G. 3. c. 116. By the 85th section of the latter, it is enacted, "that where the reversion of any manors, messuages, lands, tenements, or other hereditaments holden under any body politic or corporate, or company, or any feoffees or trustees for charitable or other public purposes,

But if there be a guardian or trustee for an infant, to whom lands are descended or de-

SECT. VII.

Resulting and
constructive
trusts.

by virtue of any lease for one or more life or lives, or for years absolute or determinable on the dropping of one or more life or lives, or by copy of court-roll or customary tenure for life or lives, shall be purchased under the powers of this act, by or with the proper monies of the person or persons for the time being, beneficially entitled to the rents and profits thereof, and where such lease or leases shall be subject to any will or settlement, so that such person or persons shall not, at the time of purchasing the reversion thereof, be entitled to the absolute interest under such lease or leases, and such person or persons shall be bound by any covenant, engagement, or condition, to renew the lease at the accustomed periods, with his, her, or their own monies, or with or out of the rents and profits of the estate, then, and in every such case the immediate estates and interests under such subsisting lease or leases, as well as the reversion expectant thereon, shall, under the direction of the said last-mentioned commissioners, be charged with and made subject to the repayment of the principal money advanced for the purchase of such reversion, with lawful interest,

to or for the benefit of the person or persons advancing the same, his, her, or their executors, administrators, or assigns; but if the person or persons so, for the time being, beneficially entitled to the rents and profits of the estates comprised in such subsisting lease or leases as aforesaid, shall not be liable to any covenant, engagement, or condition, to renew the lease at the accustomed periods with his or her own monies, or with or out of the rents and profits of the estate, then, and in such case, the reversion only expectant on the subsisting lease or leases, shall, under such direction as aforesaid, be charged and made subject for the benefit of such person or persons, with the payment of the principal money advanced for the purchase thereof, together with lawful interest, to accumulate from the time of such purchase, till the expiration of the subsisting lease, after deducting out of such interest the annual rent (if any) which shall be payable during the lease, and which shall have been purchased with the reversion, unless the person or persons advancing such money shall be desirous that the same, together with the interest, may be made a charge on the sub-

SECT. VII.
Resulting and
constructive
trusts.

vised, but the title is really in a third person, and the trustee or guardian buy in the title of the third person; this shall not be taken to be a trust for the infant; for such trustee or guardian is at liberty to purchase it as well as any other person^c: and in *O'Herlihy v.*

sisting lease or leases; in which case the immediate estates and interests under the same, as well as the reversion expectant thereon, shall be charged and made subject to the payment of such principal money and interest, in like manner as if such person or persons had been bound to renew the lease; and subject to such charges, so to be made respectively as aforesaid, the fee-simple of such manors, messuages, lands, tenements, or other hereditaments, shall be settled, under the like direction, for the benefit of the person or persons so purchasing the same, and of such other persons as would have been entitled under such will or settlement to the benefit of any renewed lease or leases for the time being, and so as to be enjoyed by them for such respective estates and interests, as, considering the alteration of the tenure, shall appear to the said commissioners most correspondent with the intention of such will or settlement: provided always, that where the immediate estates or interest, under any such lease or leases, shall be charged with and

made subject to the payment of the principal money advanced for the purchase of the reversion, the persons successively entitled to the rents and profits of the manors, messuages, lands, tenements, and hereditaments, comprised in the subsisting lease or leases respectively, shall be made chargeable with the interest accruing during his or her estate therein; and that no greater arrear than for one year shall be recoverable against any person who shall become entitled in remainder for interest accrued during the estate or term of any person or persons entitled to any preceding estate or interest in the premises: provided also, that it shall be lawful for the said commissioners to direct an application to be made to the Court of Chancery in a summary way, for obtaining direction as to the mode of settling any such reversion, or the equity of redemption thereof, where the case shall appear to them to be attended with difficulty."

^c *Lealey's case*, 2 Freem. 52.

Hodges^d, lord Redesdale has observed, "that
 "the rule is established, in order to keep
 "trustees in the line of their duty, but not
 "for the purpose of being an injury to a third
 "person, if the principal injury be to him."

SECT. VII.

Resulting and
constructive
trusts.

VIII. I shall now explain the system of
 trusts, as it more immediately refers to the
 person and acts of cestuique trust.

SECT. VIII.

Of trusts, as
more immedi-
ately referring
to the person
and acts of ces-
tuique trust.
Who may be
trustee.

(1.) Any person, who is capable of taking
 the legal estate directly and immediately to
 himself, may acquire the equitable or bene-
 ficial interest in the same estate^a.

(2.) Cestuique trust may bring his bill in
 Chancery against his trustee for breach of
 trust, or to account^f; but he has no remedy
 against him at law^g. Neither can cestuique
 trust recover upon his equitable title in the
 courts of law as against a third person^h: but
 it is necessary, in order to support or obtain his
 rights, that he should sue in the name of his

Actions and
suits by trust-
tees.

(223.)

^a 1 Schoales and Lefroy,
 123.

^b See before 86. Note,
 the king may be cestuique
 trust, Middleton v. Spicer,
 1 Bro. C. C. 201.; but an
 alien cannot, 3 Cha. Rep.
 35. I apprehend, that a
 corporation cannot take as
 cestuique trust without a
 licence in mortmain.

^f See Digby v. Cornwal-
 lis, 3 Cha. Rep. 72. Pol-
 lard v. Downes, 2 Cha. Ca.
 121.

^g Sturt v. Mellish, 2 Atk.
 612. Contra, 1 Eq. Ab.
 384. (D.) note (a.)

^h Doe v. Staples, 2 Term
 Rep. 684. Barnes v. Crow,
 4 Bro. C. C. 2.

SECT. VIII. trustees¹. Yet it is said, that a tender to cestuique trust of money due upon bond, and a refusal, is a good plea to an action of debt upon the bond by his trustee^k.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

Cestuique trust in possession may vote at an election.

(3.) By the statute 7 Will. c. 25. s. 7. it is enacted, that no person shall be allowed to have any vote in election of members to serve in parliament, for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession, or receipt of the rents and profits of the same estate; but that the mortgagor, or cestuique trust in possession, shall and may vote for the same, notwithstanding such mortgage or trust.

Conveyances by cestuique trust.

(224.)

(4.) In the case of Packer and Wyndham^l, it is said, that every disposition of cestuique trust is binding upon the trustee in a court of equity; and even at law. But although the conveyance of cestuique trust is conclusive upon the trustee to the extent of the beneficial interest conveyed, yet a trust is not alienable by the rules of the common law, and I have, in a preceding part of this work, attempted to show, that cestuique trust can-

¹ Ex parte Coysegame, 1 Atk. 191.

^k Lynch v. Clemence, Lutw. 179. ed. 1718. See the cases collected in note

to pl. 2. 18 Vin. 303. as to the effect of a release by cestuique trust claiming under a bond or covenant.

^l Prec. Cha. 415.

not convey the legal estate by virtue of the statute 1 Rich. 3. SECT. VIII.

(4. a.) In the transfer of equitable rights, it is usual in practice to adopt the species of conveyance applicable to the assurance of the legal estate; as if a person be seised of the equitable estate in fee-simple, he usually conveys it by lease and release, or bargain and sale inrolled. But this is never absolutely necessary; and in case an equitable interest is sold, it is clear, that the mere payment of the purchase-money would operate as a transfer of it. Of trusts, as more immediately referring to the person and acts of cestuique trust.
Conveyance by cestuique trust in fee-simple.

(4. b.) But when the owner of an equitable interest cannot, if such equitable interest were converted into a legal estate, convey it without the aid of a fine or recovery, it will be necessary for him to use the same kind of assurance by matter of record in the transfer of his beneficial interest, as if it had been a legal estate; and therefore the equitable rights of tenants in tail and married women must be conveyed by fine or recovery. Conveyances by cestuique trust in fee-tail, or being married women.

As to tenants in tail, it has been said, that if the trustee, having the legal estate, joins with his cestuique trust, in making a feoffment with livery, it will destroy the equitable en- Tenants in tail

SECT. VIII.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

tail^m. But this case cannot be relied upon. If the equitable tenant in tail has the immediate reversion in fee, he may acquire the equitable fee-simple by a fine; but if there are equitable remainders expectant upon his estate tail, it will be necessary for him to suffer a recoveryⁿ. But where there is an equitable estate tail, attached to, or arising from, a legal estate of the same extent, with *legal* remainders, an equitable recovery will not bar the legal remainders^o. The rule may be generally stated, that where the tenant, against whom the writ in a common recovery is brought, has only an equitable estate of freehold, the recovery, suffered upon that equitable freehold, cannot bar a legal estate tail vested in the vouchée, or any legal remainder. But the converse is not true; for if a legal, as well

^m Bowater v. Elly, 2 Vern. 344. Indeed it has been said, that a common bargain and sale by cestuique trust, is alone sufficient to bar the entail. 1 Vern. 440. 2 Vern. 133. But that opinion has been overruled. 1 P. W. 91. 1 Ves. 260. Legate v. Sewell, 2 Vern. 552. Kirkham v. Smith, Amb. 518. With respect to copyhold lands, where there is no particular custom to bar the entail of the legal estate, it seems, that a mere devise by cestuique trust is sufficient to bar the entail of the trust.

See Otway v. Hudson, 2 Vern. 563. and Mr. Cox's note to Dunn v. Green, 3 P. W. 10.

ⁿ North v. Champemoor, 2 Cha. Ca. 63. 78. 1 Vern. 13. S. C. 1 P. W. 91. S. C. Carpenter v. Carpenter, 1 Vern. 440. Beverley v. Beverley, 2 Vern. 131. Boteler v. Allington, 1 Bro. Cha. Ca. 72.

^o Robinson v. Cumming, 1 Atk. 473. Salvin v. Thornton, 1 Bro. Cha. Ca. 73. in note. Amb. 545. 699. S. C. Shapland v. Smith, 1 Bro. Cha. Ca. 74.

as beneficial, estate of freehold is conveyed to the tenant to the writ, the recovery will bar an equitable estate tail in the vouchee, and all equitable remainders expectant upon it^r.

SECT. VIII.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

When a married woman is entitled to an equitable freehold interest, not settled to her separate use, it is necessary, that she should concur with her husband in levying a fine, in order to pass it: but when personal property is settled to the separate use of a *feme covert*, she is, generally speaking, entitled to dispose of it, in the same manner, as if she were a *feme sole*, although there be no express power of disposition reserved to her^r. But where an annuity, or annual income, is settled to the separate use of a married woman, she may be restrained from appointing the unaccrued payments of it^r.

Married women.

^r See Philips v. Brydges, 3 Ves. 120. 128. Goodrich v. Brown, 2 Freem. 160. 1 Cha. Ca. 49.

^r In Peacock v. Monk, 2 Ves. 191. lord Hardwicke says, "That as to personal estate, undoubtedly where there is an agreement between husband and wife before marriage, that the wife shall have to her separate use, either the whole or particular parts, she may

"dispose of it by an act in her life, or by will; she may do it by either, though nothing is said of the manner of disposing of it." See Wagstaff v. Smith, 9 Ves. 520. Surgiss v. Crop, 18 Ves. 190. Heatley v. Thomas, 18 Ves. 596.

^r Per Lord Chanc. in Pybus v. Smith, 2 Bro. Cha. Ca. 347. See Mores v. Huish, 5 Ves. 694.

SACR. VIII.

Of trusts, as more immediately referring to the person and acts of cestuique trust.

There is a difference as to real property. In the anonymous case, 2 Ves. 192. it is said, that as to real estate, there must be an express power of appointment, in order to enable a feme covert to devise or convey it; but as to personal estate, the separate property of the wife, it is incident to it; that she may make a will or appointment of it. It has since been held^a, that where a real estate is settled to the separate use of a married woman during her life, she may, without any express power of appointment for that purpose, convey her equitable estate for life by deed, without the aid of a fine. I apprehend however, that when an estate in fee-simple is conveyed for the separate use of a married woman, without an express power of appointment reserved to her, she cannot, during her coverture, dispose of the fee-simple without concurring with her husband in levying a fine.

(225.)
Tenants for
life.

(4. c.) It has been decided, that a fine, or other alienation by cestuique trust for life, will not operate as a forfeiture of his trust estate^c; nor will such fine, or other conveyance, by him, destroy any contingent remainders expectant upon his life estate^d.

^a Burnaby v. Griffin, 3 3 Atk. 728. Whetstone v. Ves. 266. Bury, 2 P. W. 146.

^c Lethieulier v. Tracy, " 1 Ves. 27.

IX. It remains for me to consider the trustee, and the nature of his estate and office. SECT. IX.
Of the trustee,
his estate and
office.

(1.) The modern doctrine of trusts differs perhaps in no instance so essentially from the system of uses, as in the construction of courts of equity, upon the capacity or liability of persons to act as trustees. (226.)
Who may be
trustees.

Formerly, we have seen, that the intention of the parties has been frequently frustrated by the rigid adherence of the Court of Chancery to the technical scruples of the common law; for uses were considered as annexed to the estate of the feoffees in the land, and not to the land itself. Against the notion of an use attaching upon the land, we find the following curious argument;—"It is absurd to say, that confidence and trust can be reposed in land, which wants sense; and which in regard of sense is inferior to brute beasts; and it would be less absurd to say, that beasts may be trusted, who have sense and want reason, than land, which wants sense and reason also, should be trusted".

But notwithstanding the force of this grave argument, the courts of equity in later times have said, that a trust shall never fail on account of the disability, or non-appointment, of the trustee; because they hold, that the (227.)

SECT. IX.
Of the trustee,
his estate and
office.

trust, if properly created, will fasten upon, and attach to the land, intended to be made subject to it^a. The king^y, or a corporate^z body, may be a trustee; and where an estate was devised to the separate use of a *feme covert*, without the intervention of trustees, it was determined, that the husband should be a trustee for his wife^a. So in a case^b, where a devise to a corporation (in trust) was void by the late statute of mortmain, the court decreed, that the heir at law of the devisor should be a trustee for the purposes of his will.

But although the courts now generally consider the trust as attaching upon the land itself, so as to convert all persons, seised of, or acquiring the legal interest, into trustees, yet this rule has an exception in the case of a conveyance by a trustee for a valuable consideration to one, who has no notice of the trust^c. In this instance the purchaser shall not be affected by the trust.

Of incumbrances of, and forfeitures by, the trustee at law.

(2.) The rule will be further exemplified by considering, how the estate of the trustee is affected by his own acts or incumbrances.

^a *Moggridge v. Thackwell*, 3 Bro. 517.

^y *Kildare v. Rustace*, 1 Vern. 439. 1 Ves. 453. 3 Atk. 309.

^z 1 Ves. 467, 468. 536. 2 Vern. 412.

^a *Bennett v. Davies*, 2 P. W. 316. 2 Ves. 663.

^b *Sonley v. Clock-makers' Company*, 1 Bro. 81.

^c *Snagg's case*, cited 2 Freem. 43. pl. 47. 1 P. W. 273, 279.

Before the statute of uses, the estate of the feoffee was subject to all the incidents, to which a real ownership was liable; owing to this very notion, that the use was annexed to the estate of the person seised of the legal interest, and not to the land itself; and therefore if privity of estate failed in the person, acquiring the legal seisin, there was an end of the use. Hence arose just complaints against uses, and their inconveniences. After the introduction of trusts, the Court of Chancery considered the trustee as having the legal ownership, so far only as to be beneficial to *cestuique trust*, and without being subject to any disadvantage, which may arise from the trustee personally, in consequence of his seisin of the legal estate.

§ 10. IX.

Of the trustee, his estate and office.

(290.)

The legal estate vested in the trustee, is in equity, protected against his judgments, and other incumbrances, and against his bankruptcy^d; and from the dower and freebench^e of his wife; and from the tenancy by curtesy of the husband of a female trustee^f.

In *Geary v. Bearcroft*^g, it is said, that if “a man conveys lands in trust, and the trustee

^d See 1 P. W. 278. 1 Bro. 278. 2 P. W. 318. 3 P. W. 187. note A.

^e See *Hinton v. Hinton*, 2 Ves. 634, 638. *Noel v. Jevon*, 2 Freem. 43. *Be-*

vant v. Pope, 2 Freem. 71.

^f *Casborne v. Inglis*, 7

Vin. Ab. 157.

^g *Carter*, 67. But see

Lane, 39. 54.

SECT. IX.

Of the trustee,
his estate and
office.

"commits felony, these lands shall be forfeited, though he may have relief in equity." It is the same, I apprehend, if the trustee commit treason; for as the cestuique trust forfeits his estate for treason, it is not consonant to justice, that the trustee should forfeit it for the same offence. In the case of *Pawlett v. the Attorney-general*^b, baron Atkyns strongly supported this opinion, upon the ground, that the king is the fountain and head of justice and equity; and that it shall not be presumed, that he will be defective in either: and that it would derogate from the king's honour to imagine, that what is equity against a common person, should not be equity against him. Since, however, the late statuteⁱ, it is not probable, that a question

^b Hard. 465.

ⁱ 39, 40 Geo. 3. c. 88. s. 12. it is enacted, "That it shall be lawful for his majesty, his heirs and successors, by warrant, under his or their sign-manual, to direct the execution of any trusts or purposes to which any manors, messuages, lands, tenements, or hereditaments, which have escheated or shall escheat to his majesty, his heirs or successors, shall have been liable at the time the same so escheated respectively, or would have been liable in the hands of any his

majesty's subjects; and to make any grants of such manors, lands, tenements, and hereditaments, respectively, to any trustee or trustees, or otherwise, for the execution of such trusts; and to make any grants of any lands, tenements, or hereditaments, which have escheated, or shall escheat as aforesaid to any person or persons, either for the purpose of restoring the same to any of the family of the person or persons whose estates the same had been, or of rewarding any person or persons making

will arise, in the case of the king, either upon the felony, or treason of a trustee. The case of a subject, claiming as lord by escheat, is more doubtful. In the case of *Eales v. England*^k, the Master of the Rolls said, "If the trustee die without heir, the lord, by escheat, will have the land at law; yet subject to the trust here." The point, I believe, has not been directly determined^l.

SECT. IX.

Of the trustee, his estate and office.

(3.) The legislature has, in several instances, enabled trustees incapacitated, or restrained from conveying, to execute conveyances of the legal estate, vested in them as trustees. By the statute of 7 Anne, c. 19., infants having estates in lands by way of trust or mortgage, are enabled under the direction of the Court of Chancery to convey the lands, of which they are trustees^m.

Trustees incapacitated; as infants, &c. Conveyances by them.

"discovery of any such estate, as to his majesty, his heirs or successors respectively, shall seem fit; any thing in the said acts, or any of them, to the contrary notwithstanding." See 47 Geo. 3. sess. 2. c. 24.

^k Prec. Ch. 200. 1 Eq. Ab. 384. in note.

^l See the arguments in *Burgess v. Wheate*.

^m Whereas many inconveniences do and may arise, by reason that persons under the age of one-and-twenty years, having es-

tates in lands, tenements, or hereditaments, only in trust for others, or by way of mortgage, cannot (though by the direction of the cestuique trust or mortgagor) convey any sure estate in any such lands, tenements, or hereditaments, to any other person or persons: for remedy thereof be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and

SECT. IX.

Of the trustee,
his estate and
office.

It is conceived, that this act extends only to express, and not to mere constructive, trusts; and indeed there are several determined cases, grounded upon this distinction^a; and although the lord chancellor King, in the case *ex parte Vernon*^o, made an order for an infant to convey, under a constructive trust, on account of the small value of the estate, he expressly declared, that, where there is no declaration of trust in writing, he should, for the future, leave the trustee to bring his bill, and have a decree against the infant, to convey.

By the authority of the same. That from and after the 10th day of May 1709, it shall and may be lawful to and for any such person or persons under the age of one-and-twenty years, by the direction of the High Court of Chancery, or the Court of Exchequer, signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such infant or infants shall be seised or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians of such infant or infants, or person or persons entitled to the monies secured by or upon any lands, tenements, or hereditaments, whereof any infant or infants are or shall be seised or possessed by way of mortgage, or of the person or persons entitled

to the redemption thereof, to convey and assure any such lands, tenements, or hereditaments, in such manner as the said Court of Chancery or the Court of Exchequer shall, by such order, so to be obtained, direct, to any other person or persons; and such conveyance or assurance, so to be had and made as aforesaid, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said infants or infant were, at the time of making such conveyance or assurance, of the full age of one-and-twenty years: any law, custom, or usage, to the contrary in any wise notwithstanding.

^a *Goodwyn v. Lister*, 3 P. W. 387. *Anon. ibid.* 389, in note A.

^o 2 P. W. 549.

The case of Price v. Oneby, in 1745, and noticed by Mr. Fearne in his posthumous works*, is indeed an instance, in which the statute of Anne was not confined to express trusts, but extended to trusts arising under a decree. That, however, was the case of a partition, which, as Mr. Fearne observes, was for the infant's benefit, and what he was compellable to do, by law: and it is to be observed, that in a subsequent case†, decreed in 1753, which was also a decree upon a partition, the court refused to direct any conveyance of the legal estate, until one of the parties (an infant) came of age.

SECT. IX.

Of the trustee, his estate and office.

The case of Smith v. Hibbart‡ is supposed to record the opinion of lord Thurlow, that a constructive trust is within the statute of Anne: but in a late instance, in the case of Jerdon v. Foster§ and others, at the Rolls, there was a reference to the master, to ascertain and state, whether an infant, subject to a constructive trust, was a trustee within the statute of Anne; and he reported, that the infant was not a trustee within that statute. The report was confirmed, but I have not learnt, that the point was argued.

* Fearne's Post. Works, 239.

† Tuckfield v. Buller, Amb. 197.

‡ 2 Dick. 730.

§ The decrees in this case

are in March 1804, and June 1804. The master's report is dated the 17th of March 1809, and the decree confirming the report, the 12th of April 1809.

SECT. IX.

Of the trustee,
his estate and
office.

The statutes 39, 40 Geo. 3. c. 88. s. 12. and 47 Geo. 3. sess. 2. c. 24. before noticed, have authorized the king to direct the execution of any trusts affecting lands, which have become vested in him in consequence of escheat, forfeiture, or otherwise; and by the statute 4 Geo. 2. c. 10.^u, idiots and lunatics, and their committees,

" It enacts, " That from
" and after the 24th day of
" June 1731, it shall and
" may be lawful to and for
" any such person or per-
" sons being idiot, lunatic,
" or *non compos mentis*, or
" for the committee or
" committees of such per-
" son or persons, in his, her,
" or their name or names,
" by the direction of the
" lord chancellor of Great
" Britain, or the lord keep-
" er or commissioners of
" the great seal of Great
" Britain for the time be-
" ing, signified by an order
" made upon hearing all
" parties concerned, on the
" petition of the person or
" persons for whom such
" person or persons, being
" idiot, lunatic, or *non*
" *compos mentis*, shall be
" seized or possessed in
" trust, or of the mort-
" gage or mortgagors, or
" of the person or persons
" entitled to the monies se-
" cured by or upon any
" lands, tenements, or he-
" reditaments, whereof any
" such person or persons
" being idiot, lunatic,
" or *non compos mentis*,
" is, or are, or shall be

" seized or possessed by
" way of mortgage, or of
" the person or persons en-
" titled to the redemption
" thereof, to convey and
" assure any such lands,
" tenements, or heredita-
" ments, in such manner as
" the lord chancellor of
" Great Britain, or lord
" keeper or commissioners
" of the great seal of Great
" Britain, shall, by such or-
" der, so to be obtained,
" direct, to any other per-
" son or persons; and such
" conveyance or assurance,
" so to be had and made
" as aforesaid, shall be as
" good and effectual in law,
" to all intents and pur-
" poses whatsoever, as if
" the said person or per-
" sons being idiot, lunatic,
" or *non compos mentis*,
" was, or were, at the
" time of making such
" conveyance or assurance,
" of sane mind, memory,
" and understanding, and
" not idiot, lunatic, or *non*
" *compos mentis*, or had by
" him, her, or themselves,
" executed the same; any
" law, custom, or usage to
" the contrary in any wise
" notwithstanding."

are empowered under the direction of the lord chancellor to convey lands vested in them in trust, or by way of mortgage.

SECT. IX.

Of the trustee, his estate and office.

(4.) If a trustee devises all the real estates, of which he is seised, to A. and his heirs generally; the legal estate, of which he is trustee, will pass to the devisee, subject to the original trust. But if the real estate of the trustee is devised for purposes, or under limita-

General devise by trustees.

• *Braybrooke v. Inskipp*, 3 Ves. 417.

Ex parte Whitacre in the matter of Samuel Vallis, an infant. At the Rolls, 22d of July 1807.

A mortgagee in fee devised "all the rest and residue of his lands and hereditaments, and goods, chattels, mortgages, monies, and securities for money, and all other his real and personal estate, not thereinbefore disposed of, unto his nephews Samuel Rolles, John Rolles, and Samuel Vallis, and to his grand-nephew Samuel White, to be equally divided between and among them as tenants in common, and to their respective heirs, executors, and administrators, according to the nature of their respective estates;" and the testator appointed the said four devisees, executors of his will.

Samuel Vallis, one of

the devisees, died, leaving an infant heir at law; and it was referred to the master to inquire, whether the infant heir was a trustee or mortgagee within the stat. of 7th Anne. The master reported, that as the words in the residuary clause appeared to him to be sufficiently comprehensive to include the legal estate in the mortgaged premises, he conceived, that the freehold and inheritance of the said mortgaged premises passed by the will of the mortgagee to the said Samuel Rolles, John Rolles, Samuel Vallis, and Samuel White, as tenants in common: and he was of opinion that the said Samuel Vallis was an infant mortgagee of one fourth part of the mortgaged premises. The master's report was confirmed, and the infant was directed to convey pursuant to the act.

SECT. IX.
Of the trustee,
his estate and
office.

tions, inconsistent with the trust, under which the trustee holds the legal estate, the devise will not include the trust property; as if the devise be of all the trustee's real estates to A., in trust to sell, or to A. for life, with remainder to his first and other sons successively in tail, or to A. in tail, or to A. and his heirs, charged with the payment of the testator's debts and legacies; for as, in these cases, the trustee could not equitably bind the estate with limitations, or subject it to equitable interests, of this kind, courts of justice will presume, that he did not intend to devise the trust estate.

The rule, which I have stated, may, I think, be considered as the result of recent determinations; but the decisions have been various and contradictory*. The old rule was otherwise; for the courts of law, not looking beyond the bare legal estate, did not distinguish between the legal and beneficial interest; and therefore considered all property, to which the trustee had a legal right, as *his* property; and as such passing by a devise of his estate†. It is perhaps to be lamented, that the old

* See *duke of Leeds v. Munday*, 3 Ves. 348. *Ex parte Sergison*, 4 Ves. 147. *Attorney-general v. Buller*, 5 Ves. 339. *Ex parte Brettell*, 6 Ves. 577. *Attorney-general v. Vigor*, 8

Ves. 276. *Braybrooke v. Inskipp*, 8 Ves. 417. *Ex parte Morgan*, 10 Ves. 433. † *Marlow v. Smith*, 2 P. W. 198. *Ex parte Bowes*, cited in note I Atk. 606.

rule, simple in itself, and not liable to misconstruction, has not prevailed.

Secr. R.

Of the trustee,
his estate and
office.

The construction of a devise by a trustee, or mortgagee, of a legal estate, must properly be determined in a court of law; and by adopting the modern rule, courts of law must in some degree notice trusts, which in other instances they are careful to avoid. It can however be understood, that when upon the face of the instrument, vesting the legal estate in the trustee, there is an express trust declared, a court of law may take notice, that the person, devising, has the character of a trustee, without materially blending the jurisdictions of law and equity.

But it is difficult to discover any principle, upon which a court of law can adopt the modern rule, in the case of a *constructive* trust. For instance, if A. contracts to sell a real estate to B., and dies before the conveyance is made to the purchaser, having, subsequently to the contract, devised all his *real* estates to C. in tail: a court of law, before it can decide, that the estate, contracted to be sold, did not pass under the devise, must previously determine, that A. is a trustee for B.

The preceding observations will apply to conveyances by trustees of all their real estates. It is in general considered, that a bar- General conveyances by trustees.

SECT. IX.
**Of the trustee,
 his estate and
 office.**

gain and sale by commissioners of a bankrupt of all the bankrupt's real estate, does not at law pass property, of which he is trustee. It is observable, however, that the case of *Bennet v. Davies*² does not support this doctrine. The words of the Master of the Rolls are, "as if the bankrupt had been a trustee for "J. S., his bankruptcy should not IN EQUITY "affect the trust estate;" and in that case, the legal estate, it was thought, passed to the assignee.

**Of purchases
 made by the
 trustee of the
 trust estate.
 (231.)**

(5.) As courts of equity have been anxious to provide for the inconveniencies arising at law from the alienation, incumbrances, and forfeitures of the trustee, so they are extremely cautious in confirming purchases made by him of the trust estate. In the case of *Whelpdale v. Cookson*, where a trustee for the sale of land, purchased part of the trust estate for himself, lord Hardwicke declared, that he would not let the purchase stand good, although another person, being the best bidder, bought it for him at a public sale; for he knew the dangerous consequence; nor was it enough for the trustee to say, You cannot prove any fraud, as it was in his own power to conceal it³. We have already seen, that

² 2 P. W. 316.

³ 1 Ves. 9. S. C. This rule has been confirmed by many subsequent cases. See *Whitchote v. Lawrence*, 3 Ves. 740. *Campbell v.*

Walker, 5 Ves. 678. *Ex parte Reynolds*, *ibid.* 707. *Ex parte Hughes*, 6 Ves. 617. *Ex parte Lacy*, *ibid.* 625. *Lister v. Lister*, *ibid.* 631. *Ex parte James*, 8

when a trustee renews a lease, of which he is a trustee, the renewed lease shall be subject to the old trusts.

SECT. IX.
Of the trustee,
his estate and
office.

(6.) As the legal interest is vested in the trustee, he is consequently a necessary party to all suits commenced for, and against, the trust property. Generally, indeed, the cestuique trust should be also made a party^b; although the trustee may not only sue in his own name^c, but in some instances he should not bring his *cestuique trust* before the court on pain of incurring costs^d.

(232.)
Of suits by the
trustee.

(7.) It is, generally speaking, a rule, that a trustee releasing or compounding a debt, due to the trust estate, must answer for the loss occasioned by such release or composition^e. Yet this rule must always depend upon the particular circumstances of the case; for

Whether the
trustee may re-
lease or com-
pound debts.

Ves. 337. *Coles v. Trecothick*, 7 Ves. 234. In order to rescind a purchase made by the trustee for sale, the application must be made within a reasonable time (*Pryce v. Byrn*, cited 5 Ves. 681. and the arguments of the Master of the Rolls, *ibid.* 682. 11 Ves. 226.), except in the case of a body of creditors, against whom it is said, that laches does not apply. *Anon.* in Exch. cited 6 Ves. 632. In *sir Geo. Colbrooke's case*, cited 6 Ves.

622. the lord chancellor Thurlow said, that in case of a purchase by a trustee or assignee for the benefit of creditors, the confirmation of the purchase by the majority of the creditors, will not bind the individual creditors, who did not confirm.

^b 1 Har. Cha. Pract. 247.

^c *Ibid.* Toth, 285.

^d 2 Atk. 48.

^e See *Jevon v. Bush*, 1 Vern. 342. *George v. Chansey*, 1 Cha. Rep. 125.

SECT. IX.
Of the trustee,
his estate and
office.

(233.)

where a trustee in releasing or compounding a debt, acts from prudential motives, and with a view to benefit the trust property, the courts will consider his conduct, not only excusable, but in many instances, laudable^f. On the other hand, where a trustee buys in an incumbrance for less money, than is actually due, the trust estate shall receive the benefit of the composition^g.

He cannot alter
the nature of
the trust prop-
erty.

(8.) A trustee cannot (without an express power for that purpose) alter the nature of the trust property^h, either by converting land into money, investing money in the purchase of landⁱ, or by taking a lease for lives instead of renewing a lease for years^k, so as to vary the right of succession to such property; unless it be under particular circumstances, and evidently for the benefit of the trust estate^l.

His laches will
not prejudice
a cestuique
trust.

(234.)

(9.) As the trustee cannot prejudice *cestuique trust* by doing what his trust does not authorize, so he cannot, in general, injure him, by omitting to do, what his office requires him

^f Blue v. Marshall, 3 P. W. 381.

^g 3 P. W. 231. note A. Darey v. Hall, 1 Vern. 49. Morrett v. Puske, 2 Atk. 54.

^h See Earlom v. Saunders, Amb. 241.

ⁱ Rook v. Warch, 1 Ves.

451. Tullit v. Tullit, Amb. 370.

^k Witter v. Witter, 3 P. W. 99.

^l Terry v. Terry, Prec. Cha. 273. Vernon v. Vernon, cited 3 Brown, 519. Inwood v. Twine, Atk. 417.

to perform^m. Therefore, where an entry was made and a fine levied by a stranger during the infancy of *cestuique trust*, and the trustee neglected to enter for the purpose of avoiding the fine, the Court of Chancery determined, that the infant should not suffer for the laches of his trusteeⁿ. The exception to this rule is in the case of a purchaser or creditor^o.

Sacr. IX.
Of the trustee,
his estate and
office.

(10.) When money is invested in the purchase of stock in the names of trustees, they have no power to change the security, unless they are expressly allowed so to do by the trust; and therefore, if they take upon themselves to use a discretionary power in this respect, they are liable to answer for any loss, which may happen to the trust fund; it being in the election of the *cestuique trust*, either to have the individual stock restored to him, or the money, for which it was sold by the trustees^p. But while the original stock remains vested in their names, or if they purchase any other stock in pursuance of a power

He cannot vary
securities with-
out an express
power.

(245.)

^m 3 P. W. 215. 2 Atk. 406.

ⁿ Allen v. Sayer, 2 Vern. 368.

^o Note G. 3 P. W. 310. Vide ante 227.

^p Harrison v. Harrison, 2 Atk. 121. Bostock v. Blakeney, 2 Bro. 653. Poock v. Reddington, 5 Ves. 794. Note, that an execu-

tor, investing his testator's money in the purchase of three per cent. cons. or red. bank annuities, will not be liable in consequence of the fall of that stock. Ex parte Champion, cited 3 Bro. 434. Howe v. Earl of Dartmouth, 7 Ves. 137. Holland v. Hughes, 16 Ves. 111.

Sect. IX.

Of the trustee,
his estate and
office.

When liable to
accidental
losses.

- (12.) Against accidental losses, which happen to the trust estate, the courts are anxious to relieve the trustee; if such losses do not happen through his own neglect or default. If the trustee is robbed of the trust-money, the courts consider, whether he has kept it, as he would his own money^a. Does his banker fail, whereby a loss accrues to the trust fund? Equity inquires, whether the banker was in credit, at the time the money was paid into his hands^a. Does an agent of the trustee become insolvent? The question is, whether he is in good circumstances at the time of his nomination^b.

Trustees to pre-
serve contin-
gent remain-
ders.

- (13.) When trustees are appointed to preserve contingent remainders, if they join in any conveyance in order to destroy those remainders, this shall in general be deemed a breach of trust^c, whether the settlement be

^a Morley v. Morley, 2 Cha. Ca. 2. Jones v. Lewis, 2 Ves. 240.

^b Knight v. Plymouth, 3 Atk. 480. Horsley v. Chaloner, 2 Ves. 85. Ex parte Belchier, Amb. 219. But see Rider v. Bickerton, 5 Bl. Ab. 461. Pl. 12.

^c Anon. 12 Mod. 560. "If one devise to trustees, "and by express clause "therein, give them power "to appoint agents to manage the land, and they "appoint one then solvent "and good, though after-

"wards he prove insolvent, "they shall not answer for "him; *secus* if he were "not solvent at the time, "at which he was nominated. But if there were "no such direction or "power in the will, the "trustees are bound to answer for their agents at "all events."

^d Pye v. George, 2 Salk. 680. 1 P. W. 128. S. C. Else v. Osborn, 1 P. W. 368. Woodhouse v. Hickins, 3 Atk. 22.

voluntary, or not^d. In some particular instances, however, the courts have ordered the trustees to make conveyances in order to defeat the contingent estates; but it would be prudent for trustees to receive the directions of a court of equity before they agree to destroy those estates, which they are appointed to preserve^e.

SECT. IX.

Of the trustee, his estate and office.

(14.) But whenever cestuique trust is entitled to an estate tail, which he alone might have barred by an equitable recovery; then it will not be a breach of trust, if the trustee join with him in a conveyance to bar the entail, and to pass the legal estate; for his joining in this case, is nothing more, than what he is compellable to do^f.

Trustee may concur with cestuique trust in tail, to bar the entail.

(239.)

(15.) It is said to be a rule in Chancery, that if lands are vested in trustees in fee-simple, in trust for one, and the heirs of his

Trustee is not to convey the legal estate in fee-simple to cestuique trust in tail.

^d Mansell v. Mansell, 2 P. W. 678. Symance v. Tatton, 1 Atk. 613.

^e The cases upon this subject are collected, in the case of Moody v. Walters, 16 Ves. 233.; and the above doctrine is there much discussed.

^f 1 Eq. Ab. 884. (E.) note A. Cartaret v. Cartaret, 2 P. W. 134. A conveyance was made to a purchaser, and his trustee,

and the heirs of the purchaser. The purchaser by will, devises to B. in tail, with remainders over. The trustee survived the purchaser; so that B. could not suffer a recovery without the aid of the trustee. It was decreed, that the trustee should convey to B. in tail, with the remainders over according to the will. Young v. Leigh, Cary, 96, 90 Eliz.

SECT. IX.

Of the trustee,
his estate and
office.

body, with remainder over; the trustees are not to convey an estate in fee-simple to the tenant in tail; but an estate tail; although such tenant in tail will have it in his power to bar the entail, with the remainder over by a recovery.^a So if a sum of money be agreed to be laid out in land, and the lands to be settled in tail, with remainders over; the settlement shall be made accordingly, and the money shall not be paid to the tenant in tail; because there is a chance of his death before a recovery could be suffered, which can only be done in-term-time^b. But if the remainder in

^a 1 Eq. Ab. 395,

^b Short v. Wood, 1 P. W. 470. and the cases cited in note 1. to Collett v. Collett, 1 Atk. 12. 3d ed. But now, by the statute 40 Geo. 3. c. 56., it is enacted, "That from and after passing of this act, in all cases where money, under the controul of any court of equity, or of or to which any individuals, as trustees, are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, to be settled upon any person or persons in such manner that it would be competent, in case such money had been invested in the purchase of real estates, for the person or persons who would be the tenant or tenants of the first estate or estates tail therein, either

alone or together with the person or persons who would be the owner or owners of the particular preceding estate or estates therein, if any, by deed, fine, or common recovery, or any of them, or other lawful act, in the case of freehold hereditaments, or by surrender and recovery, or either of them or other lawful act, in the case of copyhold hereditaments, to bar the first estate or estates tail, and the rights and interests of all persons in remainder, it shall not be necessary to have such money actually invested in lands or hereditaments, in order that such estates tail and remainders over may be so barred, but that it shall and may be lawful to and for the High Court of Chancery, or such court of equity under the controul of

fee had in this case been limited to the tenant in tail, then it seems, that the money should have been paid to him; because he might have barred the limitation by a fine, which may be levied in vacation-time, as well as in term¹.

SECT. IX.

Of the trustee, his estate and office.

(240.)

(16.) The courts of equity look upon trusts as honorary, and not undertaken upon mercenary motives^k; and therefore in the case of

Of allowances to trustees for their case.

which such money shall be, and in the case of trustees, to and for the said High Court of Chancery, in a summary way, upon petition of the person or persons who would be tenant or tenants of the first estate or first estates tail, and of the person or persons who would be the owner or owners of the antecedent particular estate or estates, if any, in the lands and hereditaments, in case the same were purchased, such petitioners being adults, and in case where any of the parties are or is *femes covert* or a *feme covert*, she or they being first separately examined in court, or upon a commission, and consenting, to order the monies subjected to such trusts to be paid to the petitioners, or any of them, or to be paid and applied in such manner and for such purposes as the petitioners shall appoint, and the court shall approve of,

“ And be it further enacted, That in all cases where monies subjected to be laid out in the purchase of hereditaments to be settled as aforesaid, shall happen to be invested in government or real or other securities, all such securities shall, for the purposes of this act, be considered as money, and shall and may accordingly be transferred, assigned, and disposed of under an order of the respective courts aforesaid, made in a summary way upon the petition of such persons, and with such examination and consent, where necessary, as aforesaid, in such and the same manner as monies subjected to be laid out in the purchase of hereditaments, to be settled as aforesaid, are hereinbefore authorized to be paid, applied, and disposed of.”

¹ See cases *supra*.

^k 2 Atk. 60. 406.

SECT. II
Of the trustee,
his estate and
office.

Robinson v. Pett¹; lord Talbot said, it was an established rule, that a trustee should have no allowance for his care and trouble in the management of the trust; for if on those pretences, allowances were to be made, the trust might be loaded, and rendered of little value; that a great difficulty might attend in settling and adjusting the *quantum* of such allowance, especially as one man's time might be more valuable, than that of another; and that it could be no hardship upon any trustee; for it was at his option either to accept, or refuse, the trust. But if a trustee come in a fair and open manner, and tell cestuique trust, that he will not act in such a troublesome and burdensome office without further compensation given by cestuique trust, over and above the terms of the trust, and such terms be contracted for between them, this contract, lord Hardwicke observed^m, would not perhaps be set aside, though there was no precedent, wherein such a bargain had been confirmed.

(241.)

But though a trustee be not allowed for his trouble, it seems, that if he employ a bailiff to manage the trust estate, he must be allowed for the employment of, and payments made to, such bailiffⁿ.

¹ 3 P. W. 251. S. C. See French v. Baron, 2 Atk. 120. note 3. In the matter of Annesley, Amb. 78. Chambers v. Goldwin, 5

Ves. 334. 9 Ves. 254.

^m 2 Atk. 60.

ⁿ Bonithorn v. Hockmore,

1 Vern. 316.

(17.) Notwithstanding trustees are not allowed any thing for their trouble and care in the management of the trust estate, it is reasonable, that they should be allowed all costs, and expenses, which may be incurred in the execution of the trust, and the discharge of their office; provided there be no mismanagement, nor breach of trust^{*}. Therefore lord King said[†], it was a rule, that a trustee ought to be saved harmless by cestuique trust, as to all damages relating to the trust. Thus, where a trustee has honestly and fairly, without any possibility of being a gainer, laid down money, by which the cestuique trust was discharged from being liable to pay a greater sum, or from a plain and great hazard of being so, the trustee ought to be repaid[‡].

Sacr. II.

Of the trustee, his estate and office.

Of allowances in respect of expenses incurred by the trustee.

(242.)

(18.) If a trustee, said lord Hardwicke[†], err in the management, and be guilty of a breach of trust, yet if he quit it with the approbation of cestuique trust, the breach ought in the first place to fall on the estate of cestuique trust, who consented to it; for the courts are ever anxious to deliver the trustee from any misapplication of the trust-money.

Where a breach of trust shall fall upon the estate of cestuique trust.

^{*} Hithersell v. Hales, 2 Cha. Rep. 158. and Finch Rep. 361. 12 Mod. 560.
² Cha. Ca. 138,

[†] 2 P. W. 455.

[‡] Balsh v. Hyham, ibid. 453.

[§] 3 Atk. 444.

SECT. IX.

Of the trustee,
his estate and
office.

Trustee charge-
able for what
he shall re-
ceive.

(243.)

And lastly. Where there are two or more trustees, the rule is, that each of them shall be charged for his own wilful neglect, default, or breach of trust only; and that the innocent trustee shall not suffer for the misconduct of his co-trustee. Therefore it has been decided, that a trustee, who has joined in a voucher for the whole trust-money, but has in truth only received a part of it, shall be charged for so much only, as has actually come to his hands^a; unless indeed fraud, or what is tantamount to it, gross negligence, should appear in the transaction^b.

^a See Leigh v. Barry, 3 Atk. 584. note 2, last ed.

^b Bridgm. 38. Keble v. Thompson, 3 Bro. 112.

See lord Shipbrook v. lord Hinchinbrook, 11 Ves. 252. 16 Ves. 477. S. C.

APPENDIX.

APPENDIX, No. I.

Proviso shifting the Use upon Neglect or Refusal to take a Name, and bear certain Arms.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that every husband of each of them the said Eliz. L., Letitia L., and Arabella L., and of each of their daughters, who under or by virtue of the limitations hereinbefore contained, or of these presents, shall become entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments expressed to be hereby granted and released, shall apply for, and endeavour to obtain, an act of parliament, or proper license from the crown, or take such other ways or means, as may be requisite or proper, to enable or authorize him to take and use the surname of L. only, and no other surname, and to quarter the arms of L. with his own family arms within the time hereinafter mentioned, that is to say, if the wife of such husband shall be entitled to the actual posses-

Appendix,
No. I.

Appendix,
No. I.

sion or receipt of the rents and profits of the said manors and other hereditaments at the time of her marriage; then within the space of one year after such marriage; but if the wife of such husband shall not be entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments at the time of her marriage, then within one year after she shall so become entitled as aforesaid; and also, that every other person, who under or by virtue of the limitations hereinbefore contained, or of these presents, shall be entitled to the actual possession or receipt of the rents and profits of the said manors and other hereditaments expressed to be hereby granted and released, shall within one year after he shall so become entitled to the possession or receipt of the rents and profits of the said manors and other hereditaments, apply for, and endeavour to obtain, an act of parliament or proper license from the crown, or take such other ways or means, as may be requisite or proper, to enable or authorize him to take and use the surname of L., and no other surname, and to quarter the arms of L. with his own family arms; and that in case any such person or persons shall refuse, or neglect, to take such surname and arms, and to take and use the steps or means, which shall be requisite or proper to enable and authorize him or them so to do, by the space of one year to be computed as afore-

said, then if the person so refusing or neglecting shall be the husband of either of them the said Elizabeth L., Letitia L., and Arabella L., the limitation hereinbefore contained to the use of such of them, whose husband shall so refuse or neglect, and to the use of her husband after her death, shall cease, determine, and become absolutely void; and if such person so refusing or neglecting shall be the husband of any daughter of them the said Elizabeth L., Letitia L., and Arabella L., the limitation hereinbefore contained to the use of the daughter, whose husband shall so refuse or neglect, and her heirs male, shall cease, determine, and be absolutely void: and in case the person so neglecting or refusing shall be any other than such husband as aforesaid, the limitation hereinbefore contained to the use of such person and the heirs male of his body, shall cease, determine, and be absolutely void; and the said manors and other hereditaments shall in either of such cases immediately thereupon go to the person next beneficially entitled in remainder under the limitations hereinbefore contained, in the same manner as if the person or persons whose estate or estates shall so cease, determine, and become void, being tenant or tenants for life, was or were dead, or being tenant or tenants in tail, was or were dead without issue inheritable under such entail, without prejudice nevertheless to any portion of

Appendix,
No. I.

portions, lease or leases, which previously to such cesser or determination, shall have been charged, made, or created, by virtue, or under the exercise of, any of the powers hereinafter contained. And it is hereby further agreed and declared between and by the said parties hereto, that the cesser or determination of any estate or estates of any tenant or tenants for life, by virtue of the proviso hereinbefore contained, shall not operate to exclude, prevent, or prejudice any of the contingent remainders hereinbefore limited to the son or sons, daughter or daughters of such tenant or tenants for life, or any other person or persons; but that the remainder hereinbefore limited to the said trustees and their heirs during the life of every such tenant for life, shall after such cesser or determination, take effect and continue for preserving such contingent remainders, and giving them effect, as they may arise; and that immediately from and after such cesser or determination of such preceding estate or estates for life or lives, and during the suspense and contingency of such then expectant remainder, the said A. and B. and their heirs, shall receive, pay, and apply the rents and profits of the said manor and other hereditaments which would belong to such tenant or tenants for life, if such cesser or determination had not taken place, unto the person or persons for the intents and purposes, and in the manner to, for,

and in which, the same rents and profits would be, or would have been payable or applicable, under, or by virtue of, the limitations and provisoes hereinbefore contained, in case such tenant or tenants for life was or were actually dead; so that from and immediately after such cesser or determination, the issue of each such tenant or tenants for life, entitled for the time being under the limitations aforesaid to the said manors and other hereditaments in remainder, immediately expectant upon the decease of such tenant or tenants for life, may be entitled to the rents and profits of the said manors and other hereditaments for his and their own use and benefit during the life of the parent, as if such parent were dead; and that in case no such issue be in existence, then during the vacancy or contingency of such issue, the person next beneficially entitled for the time being under the limitations aforesaid, to a vested remainder in the said manors and other hereditaments expectant upon the decease of such tenant or tenants for life, and failure of his, her, or their issue, shall and may be entitled to the said rents and profits for his and their proper use and benefit respectively, but without any exclusion of, or prejudice to, the estate, interest, or right of any such issue afterwards coming into existence, but only from the time of the birth of such issue respectively.

APPENDIX, No. II.

*Proviso for shifting the Use upon the Accession
of another Estate.*

Appendix,
No. II.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that if the manor of and hereditaments in the county of mentioned and comprised in the settlement made in consideration of, and previously to the marriage of A. B., bearing date, &c., and thereby limited and settled upon or to the use of him the said A. B. for life, shall at any time, by or under the uses and limitations in the same settlement contained, descend or come for an estate tail in possession to, or upon, the elder or any other son of the said C. D. on the body of the said E. F. begotten, born in the lifetime of the said C. D. or in due time after his decease, or to or upon the issue male of such elder or other son, so as to be in the actual possession or receipt of the rents and profits thereof, and there shall be living any other son of the body of the said C. D. on the body of the said E. F. begotten, than the son to or upon whom, or upon whose issue male, such estate shall come or descend, or any heirs male of the body of such other son, then and in that case, and so often as the same shall happen, the use or uses hereinbefore limited to or for the benefit of such son, or

his issue male, upon whom such manor and hereditaments, in the county of shall descend or devolve for an estate tail in possession as aforesaid, and his or their issue male, of and in all and singular the hereditaments hereinbefore granted and released, or intended so to be respectively as aforesaid, shall cease, determine, and become void, as if such son or issue male was or were actually dead without issue male of his or their body or bodies; and then and thenceforth the same hereditaments hereby granted and released shall immediately go and remain to the use of such person and persons, as by virtue of the limitations hereinbefore contained would then be entitled, as the person or persons next in remainder, to the same hereditaments, in case such son or issue male, so becoming entitled to the said manor of and hereditaments, in the county of as aforesaid, was or were then dead without issue male of his or their body or bodies; and the same person or persons shall in every such case be entitled to take the same estate and estates in the said hereditaments hereby granted and released, as he or they would have been entitled to take therein by virtue of these presents, if such son, or issue male, so becoming entitled to the said manor and hereditaments, in the county of was or were actually dead without issue male as aforesaid.

APPENDIX, No. III. a.

Power to lease for 21 Years in Possession at Rack-rent.

Appendix,
No. III. a.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said A. B. from time to time during his life, and after his decease then for the guardian or guardians for the time being of any child or children of the said A. B. on the body of the said C. D. to be begotten, who by virtue of, or under the limitations hereinbefore contained, shall be entitled to the possession or receipt of the rents and profits of the hereditaments hereby granted and released, or intended so to be, from time to time during the minority or respective minorities of such child or children, to demise or lease all or any, or any part or parts of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, to any person or persons for any term or number of years not exceeding 21 years in possession, and not in reversion or by way of future interest, so that there be reserved and made payable in every such lease during the continuance thereof, the best and most improved yearly rent or rents, to go along with, and be incident to, the immediate

reversion of the premises so to be leased, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift for the making thereof, and so that in every such lease there be contained a condition of re-entry on non-payment of the rent or rents to be thereon, or thereby, respectively reserved by the space of 21 days next after the same shall become due and payable, and so that the lessee or the respective lessees, to whom such lease or leases shall be made, seal and deliver a counterpart or counterparts of such lease or leases, and so that no lessee to whom any such lease shall be made, be by any clause or words therein contained authorized to commit waste, or exempted from punishment for committing waste.

Appendix,
No. III. a.

APPENDIX, No. III. b.

*Power to lease for three Lives in Possession or
Reversion, at ancient or accustomed Rents.*

PROVIDED always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful for the said A. B. during his life, and after his decease for the guardian or guardians for the time being of any child or children of the said A. B. on the body of the said C. D. lawfully to be begotten, who by virtue of, or under, the limitations hereinbefore contained,

Appendix,
No. III. b.

**Appendix,
No. III. b.**

shall for the time being be entitled to the possession or receipt of the rents and profits of the said manors and other hereditaments hereby granted and released, or intended so to be, during the minority or respective minorities of such child or children, by any deed or deeds, or by copy or copies of court roll, to demise, lease, or grant such part and parts of the said manors and other hereditaments as are now, or have been usually demised or leased, or have been granted by copy of court roll for one or more life or lives, or for years, determinable on the dropping of one or more life or lives, to any person or persons for one, two, or three lives, or for any term or number of years, determinable on the death or deaths of one, two, or three person or persons, either in possession or in reversion, and to accept or take any fine or premium for the making or granting of every such lease or grant; so that there be not more than three lives in being at most upon any part of the said premises so to be granted or leased at any one time; and so that no such grantee or lessee, his, her, or their heirs, executors, administrators, or assigns, be made dispunishable of waste by any express words therein; and so that upon every such grant or lease the usual and accustomed rents, heriots, and services at the least, or proportional rents, heriots, and services, where a greater or lesser part of any farm or farms, tenement or tenements, shall either separately, or together with any other part or parcel of

the same premises or other lands, be demised or granted, or rents, heriots, or services, amounting in the aggregate to the usual rents, heriots, or services, where two or more farms or tenements shall be granted or demised together, be reserved and made payable during the continuance of such grant or lease. And it is hereby agreed and declared, that such rent or rents to be reserved upon every such grant or lease shall be incident to, and shall go along with, the immediate reversion expectant on such grant or lease; and that in every such grant or lease (other than upon grants or demises by copy of court roll) there shall be contained a clause of re-entry for non-payment of the rent or rents to be thereby reserved for the space of 21 days after any part thereof shall become due, and that the respective lessees of the said freehold hereditaments shall execute counterparts of their respective leases; provided always, that if any such grant or lease shall be made by the guardian or guardians of any infant child or children for the time being entitled as aforesaid, then the fine or premium, fines or premiums which shall be received upon every such lease or grant shall be considered as part of the personal estate of the child or children for the time being entitled to the possession or receipt of the rents and profits of the hereditaments, which shall be so granted or demised as aforesaid.

APPENDIX, No. IV. a.

*Power enabling a Tenant for Life in Possession
to limit a Rent-charge by way of Jointure.*

Appendix,
No. IV. a.

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful for the said A. B. by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, but subject and without prejudice to the said yearly rent-charge of £ and the powers and remedies hereinbefore limited for enforcing the payment thereof, and to the aforesaid term of 99 years under the trusts aforesaid, for better securing the same yearly rent-charge, to limit or appoint to, or to the use of, or in trust for, any woman or women whom he shall or may marry, for her or their life or respective lives, and for or by way of her or their jointure or respective jointures, and in bar, or without

being in bar, of her or their dower or respective dowers, and either before or after marriage, any annual sum or annual sums of money, or yearly rent-charge or yearly rents-charge, not exceeding the yearly sum of £ of lawful money of Great Britain, to be issuing and payable out of, and charged and chargeable upon, all or any part of the manor and other hereditaments expressed to be hereby appointed and released, free from taxes, and without any other deduction whatsoever (except for or on account of the present or any future tax upon property or income), and to be paid in such manner as to the said A. B. shall seem meet; and also to limit and appoint to or for the woman or women respectively, to or for whom the annual sum or annual sums, or yearly rent-charge or yearly rents-charge, shall be so appointed as aforesaid, usual powers and remedies for recovering and enforcing payment thereof respectively by distress and entry upon, and perception of the rents and profits of, the hereditaments which shall be so charged with the said annual sum or annual sums, yearly rent-charge or yearly rents-charge; and also to limit and appoint the hereditaments, which shall be so charged, to any person or persons, for any term or terms of years, with or without impeachment of waste, upon such trusts for better securing the due payment of such annual sum or annual sums, or yearly rent-charge or

Appendix,
No. IV. a.

yearly rents-charge, as to the said A. B. shall seem meet; but so, that upon the death of the woman or respective women, for the benefit of whom such term or respective terms shall be so created, and the payment of the rent-charge or respective rents-charge, and the expenses incurred by the non-payment thereof respectively, the term or respective terms, which shall be created for securing such yearly rent-charge or respective rents-charge, or so much of the same term or respective terms as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge or respective rents-charge, shall be made to cease and determine.

APPENDIX, No. IV. b.

Proviso enabling Tenants for Life in Remainder to limit Rents-charge, by way of Jointure.

Appendix,
No. 4. b.

PROVIDED always, and it is hereby agreed and declared between and by the said parties to these presents, that it shall and may be lawful for each of them the said C. D., E. F., and G. H., either before, or when, by virtue of the limitations hereinbefore contained, he shall be in the possession, or entitled to the receipt of the rents and profits of the here-

ditaments expressed to be hereby appointed and released, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils, thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses (but subject, and without prejudice, to the uses and estates preceding the use or estate of the person, making such appointment, and to the powers relating to such preceding uses or estates, if any such uses, estates, or powers shall be then subsisting, or capable of taking effect, or being exercised; and also subject, and without prejudice, to the uses or estates, if any, which shall or may be limited in exercise of the same powers or any of them), to limit or appoint unto, or to the use of, or in trust for, any woman or women, with whom he may intermarry, for the life or respective lives of such woman or women respectively, and for her or their jointure or respective jointures, and in bar, or without being in bar, of her or their dower or respective dowers, and either before or after marriage, any annual sum or yearly rent-charge, or annual sums or yearly rents-charge, not exceeding in the whole the sum of £ of lawful

*Appendix,
No. IV. b.*

money of Great Britain, to be yearly issuing out of, and charged and chargeable upon, all or any part of the said hereditaments expressed to be hereby appointed and released, free from taxes, and without other any deduction whatsoever, except for or on account of the present or any future tax upon property or income, and to be paid in such manner as to him shall seem meet; and also to limit or appoint to or for the woman or respective women to or for whom such annual sum or yearly rent-charge, annual sums or yearly rents-charge, shall be so appointed, usual powers and remedies for recovering and compelling payment thereof by distress and entry, and perception of rents and profits; and also to limit and appoint the same hereditaments unto any person or persons for any term or terms of years, either with or without impeachment of waste, upon such trusts, for better securing the due payment of such annual sum or annual sums, or yearly rent-charge or yearly rents-charge, as to the person for the time being making such appointment, shall seem meet; but so that, upon the death of the woman or respective women for the benefit of whom such term or respective terms shall be so created, and the payment of the rent-charge or respective rents-charge, and the expenses incurred by the non-payment thereof respectively, the term or respective terms which shall be created for securing such yearly rent-

charge or respective rents-charge, or so much of the said term or respective terms as shall not be disposed of under the trusts to be declared for securing the same yearly rent-charge or respective rents-charge, shall be made to cease and determine: but it is hereby agreed and declared between and by the said parties to these presents, that if they the said C. D., E. F., and G. H., or any of them, at any time or times hereafter, before they respectively shall by virtue of, or under, the limitations hereinbefore contained, be in the actual possession or receipt of the rents and profits of the hereditaments expressed to be hereby appointed and released, shall, in exercise of the powers hereinbefore reserved to them respectively, limit or appoint to, or in trust for, any woman or women whom he or they shall or may marry, any annual sum or annual sums, or yearly rent-charge or yearly rents-charge, by way of jointure as aforesaid, then and in every such case, no annual sum or annual sums, yearly rent-charge or yearly rents-charge, which shall be so limited or appointed as aforesaid, shall take effect in possession, or charge the hereditaments expressed or intended to be charged with the same respectively, or be payable, unless and until the person limiting or appointing the same as aforesaid, shall under, or by virtue of, the limitations aforesaid, or some of them, become entitled to the possession or receipt of the

*Appendix,
No. IV. b.*

rents and profits of the same hereditaments, or if he shall die previously thereto, then unless and until he would, in consequence of the determination of the uses or estates preceding the use or estate hereby limited to him, have become, if living, entitled to the possession or receipt of the rents and profits of the same hereditaments, at any time during the life of his wife, to or for whom such annual sum or yearly rent-charge shall be so limited as aforesaid.

Provided also, and it is hereby agreed and declared between and by the said parties to these presents, that the said hereditaments shall not, under or by virtue of these presents, or the powers hereinbefore contained, or any of them (and including the said yearly rent-charge of £ , provided for the said I. K. as aforesaid), be at any one time subject or liable to the payment of any annual sum or annual sums, or yearly rent-charge or yearly rents-charge by way of jointure, exceeding in the whole the annual sum of £ ; so that if, by virtue or in exercise of the aforesaid powers of jointuring, or any of them, the said hereditaments, or any part or parts thereof, would, in case this present proviso had not been inserted, be charged with a greater annual sum for jointures in the whole, than the said sum of £ , the payment of the sum occasion-

ing such excess, or such part thereof as shall occasion the same, shall, during the time of such excess, be suspended.

Appendix,
No. IV. b.

APPENDIX, No. V. a.

*Proviso enabling a Tenant for Life, in Possession,
to charge for younger Children's Portions.*

PROVIDED always, and it is hereby agreed and declared between and by the said parties hereto, that it shall and may be lawful to and for the said A. B., at any time or times during his life, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses (but subject, and without prejudice, to the said yearly rent-charge of £ and the powers and remedies hereinbefore limited for enforcing payment thereof, and to the said term of 99 years, under the trusts aforesaid, for better securing the same yearly rent-charge, and also subject, and without prejudice, to any other jointure, which may be limited or created

Appendix,
No. V. a.

Appendix,
No. V. a...

by the said A. B., in exercise of the power hereinbefore reserved to him for that purpose); to subject and charge all or any part of the said hereditaments expressed to be hereby released, to and with the payment of any sum or sums of money, not exceeding in the whole the sum of £ of lawful money of Great Britain, for the portion or portions of all, and every, or any of the children of the said A. B., lawfully begotten or to be begotten (not being any of them an eldest or only son for the time being entitled to the said hereditaments expressed to be hereby released for an estate tail in possession, or in remainder expectant upon the decease of the said A. B.), with interest for the same at any rate, not exceeding 5*l.* for every 100*l.* by the year, to be paid to, or shared and divided between or amongst all, and every, or any one or more of the children of the said A. B. (not being any of them an eldest or only son for the time being entitled as aforesaid), at such age or respective ages, days, or times, and in such parts, shares, and proportions, and with such conditions, restrictions, and limitations over for the benefit of some or one of the same children (not being any of them an eldest or only son for the time being entitled as aforesaid), and in such manner, as he the said A. B., by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment,

to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, shall direct or appoint; and that for the purpose of raising such portion or portions, with interest for the same, it shall and may be lawful for the said A. B. by the same or any other deed or deeds, instrument or instruments in writing, so sealed and delivered and attested as aforesaid, or by such his last will and testament in writing, or any codicil or codicils thereto, so signed, published, and attested as aforesaid (but subject, and without prejudice, as hereinbefore is mentioned), to limit and appoint all or any part of the hereditaments which shall be so charged as hereinbefore is mentioned, with the appurtenances, to any person or persons for any term or terms of years, with or without impeachment of waste, in trust, by way of mortgage, to raise the money so to be charged; but so that it be declared by the deed, will, or instrument, creating such term or terms of years, that when the trusts which shall be declared concerning the same term or terms, shall have been fully performed or satisfied, or shall have become unnecessary or incapable of being performed, and the costs, charges, and expenses of the trustee

*Appendix,
No. V. a.*

or trustees of the same term or terms in and about the execution and performance of the trusts thereof, shall be paid or satisfied, the same term or terms, or so much thereof as shall not be disposed of under the trusts thereof, shall cease and determine.

APPENDIX, No. V. b.

Proviso enabling Tenants for Life in Remainder to charge for younger Children's Portions.

*Appendix,
No. 5. b.*

PROVIDED always, and it is hereby further agreed and declared between and by the said parties to these presents, that it shall and may be lawful to and for each of them the said C. D., E. F., and G. H., either before or when, and as, by virtue of or under the limitations hereinbefore contained, he shall be in the actual possession, or receipt of the rents and profits of the said hereditaments, expressed to be hereby released, by any deed or deeds, instrument or instruments, in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested

by, three or more credible witnesses, but subject and without prejudice to the uses and estates preceding the use or estate hereby limited to him, and to the powers relating to such preceding uses or estates, if any such uses, estates, or powers shall be then subsisting, or capable of taking effect and being exercised; and also subject and without prejudice to the uses or estates to be limited in execution of the same powers or any of them, and subject and without prejudice to any jointure limited or created, or which shall be limited and created by him in exercise of the power for that purpose hereinbefore reserved to him, to subject and charge all or any part of the said hereditaments expressed to be hereby released, to and with the payment of any sum or sums of money for the portion or portions of the child or children of the person making such appointment, not being any of them an eldest or only son for the time being entitled to the said hereditaments, for an estate in tail male in possession, or in remainder expectant on the decease of his parent, not exceeding in the whole the sum or sums of money herein-after mentioned, (that is to say;) If but one such child, not being an eldest or only son for the time being entitled as aforesaid, not exceeding the sum of £ for his or her portion; if two or three such children, and no more, not being any of them an eldest or only son for the time being entitled as afore-

*Appendix,
No. V. b.*

said, not exceeding the sum of £ for their portions; and if more than three such children, not being any of them an eldest or only son for the time being entitled as aforesaid, not exceeding the sum of £ for their portions; and with interest for the same sums of money respectively, at any rate not exceeding 5*l.* for every 100*l.* by the year; and such sum or sums of money to be paid to such child, or if more than one such child, then to be paid to, shared and divided between, or among, the children respectively for whom the same shall be intended to be provided, at such age or respective ages, days or times, and if more than one, in such parts, shares, and proportions, and with such conditions, restrictions, and limitations over for the benefit of some or one of the same children, as the person making such limitation or appointment shall by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be by him sealed and delivered in the presence of, and to be attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, direct or appoint; but so nevertheless, that if there shall be only one such child of the person making such appointment, who shall live to attain a vested interest in the sum or sums of

money so to be charged as aforesaid, such child shall not in any case, by survivorship or otherwise, have or be entitled to more than the sum of £ for his or her portion; and if there shall be two or three such children, and no more, who shall live to attain vested interests in the respective portions so to be charged as aforesaid, such two or three children shall not in any case, by survivorship or otherwise, have, or be entitled to more than the sum of £ for their portions: and that for the purpose of raising such portion or portions and interest for the same respectively, it shall and may be lawful to and for the person making such appointment as lastly hereinbefore is mentioned, by the same, or any other deed or deeds, instrument or instruments in writing, so sealed, delivered, and attested as aforesaid, or by such his last will and testament in writing, or any codicil or codicils thereto, so signed, published, and attested as aforesaid, but subject and without prejudice as aforesaid, to limit or appoint all or any part of the hereditaments which shall be so charged as lastly hereinbefore is mentioned, to any person or persons for any term or terms of years, with or without impeachment of waste, upon trust, by way of mortgage, to raise the money so to be charged; but so that it be declared by the deed, will, or instrument creating such term or terms of years, that when the trusts which shall be declared concerning the same

Appendix,
No. V. b.

term or terms shall have been fully performed or satisfied, or shall have become unnecessary or incapable of being performed, and the costs, charges, and expenses of the trustee or trustees of the same term or terms in and about the execution and performance of the trusts thereof shall be paid or satisfied, the same term or terms, or so much thereof as shall not be disposed of under the trusts thereof, shall cease and determine: but it is hereby agreed and declared between and by the said parties hereto, that if the said C. D., E. F., and G. H., or any of them, at any time or times hereafter, before they shall respectively by virtue of, or under, the limitations hereinbefore contained, be in the actual possession or receipt of the rents and profits of the hereditaments expressed to be hereby released, shall, in exercise of the powers hereinbefore enabling them respectively in that behalf, subject and charge the said hereditaments or any of them, or any part thereof, with the payment of any sum or sums of money for a portion or portions as aforesaid; then, and in every such case, the sum or sums of money so expressed or intended to be charged for a portion or portions, shall not be a lien or a charge upon the hereditaments so expressed, or intended to be charged with the same respectively, or become vested in, or payable to, any person or persons whomsoever, nor carry interest, unless and until the person or persons

so charging the same hereditaments with a portion or portions as aforesaid, or some one, or more of his or their issue male, shall under, or by virtue of, the limitations hereinbefore contained, or any of them, become entitled to the actual possession or receipt of the rents and profits of the same hereditaments, any thing hereinbefore contained to the contrary notwithstanding: provided always, nevertheless, and it is hereby agreed and declared between and by the said parties to these presents, that the said hereditaments shall not under, or by virtue of, the powers hereinbefore contained, or any of them, be at any one time subject or liable to the payment of any sum or sums of money exceeding the principal sum of £ in the whole, for the portions of daughters or younger sons as aforesaid.

Appendix,
No. V. b.

APPENDIX, No. VI.

PROVIDED always, and it is hereby declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, and they and he are hereby authorized and empowered, at any time or times hereafter, at the request and by the direction of the said E. E. and I. T. during their joint

Appendix,
No. VI.

Power of selling and exchanging.

(248.)

**Appendix,
No. VI.****Power of selling and exchanging.****(249.)**

lives, and after the decease of either of them, then at the request and by the direction of him or her surviving, during his or her life (such request and direction to be testified by some writing or writings sealed and delivered by the said E. E. and I. T. or the survivor of them, and to be attested by two or more credible witnesses), to make sale, alien, and dispose of, or to convey in exchange for, or in lieu of, other messuages, lands, or hereditaments, to be situate somewhere in England or Wales, all or any part of the hereditaments hereby granted and released, or intended so to be, with the appurtenances, and the inheritance thereof in fee-simple, to any person or persons whomsoever, either together or in parcels, for such price or prices in money, or for such equivalent or recompense in messuages, lands, or hereditaments, as to them the said B. B. and C. C. or the survivor of them, or his heirs, shall seem reasonable; and that for the intents and purposes aforesaid, or any of them, it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, at such request, and with such direction, and so testified as aforesaid, by any deed or deeds, writing or writings, to be by them the said B. B. and C. C. or the survivor of them, or his heirs, sealed and delivered in the presence of, and attested by, two or more credible witnesses, to revoke,

(250.)

determine, and make void all and every the uses, estates, trusts, limitations, powers, provisoes, and agreements, hereinbefore limited, expressed, declared, and contained, of and concerning the hereditaments so to be sold or exchanged, or any part thereof; and by the same, or any other deed or deeds, writing or writings, to be by him or them sealed and delivered, and attested as aforesaid, to limit and appoint, direct and declare, such use or uses, estate or estates, trust or trusts, of the hereditaments, the uses whereof shall be so revoked, which it shall be thought necessary or expedient to limit, declare, or appoint, in order to effect such sale, exchange, or disposition as aforesaid; and that upon any such exchange as aforesaid, it shall and may be lawful for the said B. B. and C. C. or the survivor of them, or his heirs, to receive or take any sum or sums of money by way of equality of exchange; and also upon payment of any money to arise by such sale of the said hereditaments, or any part thereof, or any money to be received or taken for, or by way of, equality of exchange, it shall and may be lawful to and for the said B. B. and C. C., or the survivor of them, or his heirs, to give and sign receipts for the money, for which the same shall be so sold, or so to be paid for equality of exchange; which receipts shall be sufficient discharges to the person or persons paying the same respec-

*Appendix,
No. VI.*

Power of selling and exchanging.

(251.)

Appendix,
No. VI.

Power of selling and exchanging.

(252.)

tively, for the money for which the same shall be so given, or for so much thereof as in such receipts shall be respectively acknowledged or expressed to be received; and that the person or persons paying the same respectively, and taking such receipt or receipts for the same as aforesaid, shall not afterwards be obliged to see to the application, or be in anywise answerable or accountable for any loss, misapplication, or non-application of such money, or any part thereof*. Provided nevertheless, and it is hereby also declared and agreed, by and between the said parties hereto, that when all or any part or parcel of the said hereditaments, hereby made saleable as aforesaid, shall be sold in pursuance of these presents for a valuable consideration in money, and also when any sum or sums of money shall be received for equality of exchange in pursuance of the power hereinbefore contained, then they the said B. B. and C. C. or the survivor of them,

* It is usual to introduce a clause in this place declaring, that, upon sale or exchange, the estates so sold, or exchanged, shall be discharged of the uses of the settlement; and that the releasees shall thenceforth stand seised to the use of the purchaser. But this clause seems to be, altogether useless: for the appointment under the power must necessarily discharge

the estates of the former uses. Besides, as the uses under the appointment may be limited, so as to provide for a variety of circumstances, there is an impropriety in declaring, that the releasees in the original settlement shall stand seised to the use of the purchaser, or the person to whom the estate shall be conveyed, and his heirs.

or his heirs, shall with all convenient speed (with the consent of the said E. E. and I. T. during their joint lives, or of the survivor of them during his or her life, to be testified by writing under their, his, or her hands or hand, and after the decease of such survivor, then with the consent in writing of the person or persons who would, under or by virtue of the limitations hereinbefore contained, or to be contained or referred to in the settlement or conveyance hereinafter directed, or any of them, be for the time being in the actual possession, or entitled to the receipt of the rents and profits of the hereditaments to be purchased as hereinafter is mentioned or directed, in case the same were then actually purchased, if such person or persons be of full age, but if not, then with the consent in writing of the guardian or guardians for the time being of such person or persons respectively) lay out^b and invest all and every the sum and

Appendix,
No. VI.

Power of selling and exchanging.

(253.)

^b Sometimes the following form is adopted in lieu of that here stated—"lay out and invest the monies to arise by such sale or sales, and to be received for equality of exchange, in the purchase of a clear and indefeasible estate of inheritance in fee-simple, or of lands of a leasehold or copyhold tenure convenient to be held there-with, or with any of the hereditaments hereinbe-

fore expressed to be here-by granted and released (such leasehold hereditaments being held for an unexpired term of not less than 60 years); and moreover that the said B. B. and C. C., or the survivor of them, or the heirs, executors, or administrators of such survivor, do and shall settle and assure, or cause to be settled and assured, as well the messuages, lands,

Appendix,
No. VI.Power of selling
and exchanging.

sums of money, which shall arise by such sale or sales, and be paid for equality of exchange as aforesaid, in the purchase of other messuages, lands, or hereditaments in possession, to be situate, being, or arising somewhere in England or Wales, of a clear and indefeasible estate of inheritance in fee-simple (whereof any part, not exceeding one fourth part in any one purchase, may, if the parties interested shall think fit, be copyhold of inheritance); and as well the hereditaments so to be purchased, as all and every the heredita-

“ tenements, and heredita-
“ ments so to be purchased,
“ as the messuages, lands,
“ tenements, and heredita-
“ ments so to be received
“ in exchange as hereinbe-
“ fore is mentioned, to such
“ and the same uses, upon
“ and for such and the same
“ trusts, intents and pur-
“ poses, and with, under,
“ and subject to, such and
“ the same powers, provi-
“ soes, declarations, and
“ agreements, as are in and
“ by these presents limited,
“ expressed, declared, and
“ contained of and con-
“ cerning the premises,
“ which shall be so sold or
“ exchanged, or as near
“ thereto as the nature or
“ quality of the lands so to
“ be purchased, and the
“ deaths of parties, and
“ other circumstances, will
“ permit; yet so that if any
“ of the said hereditaments
“ so to be purchased shall

“ be held by lease or leases
“ for years, the same lease-
“ hold hereditaments shall
“ not vest absolutely in any
“ son of the said E. E. on
“ the body of the said F. F.
“ to be begotten, who shall
“ take an estate in tail by
“ purchase of and in the
“ said freehold heredita-
“ ments, unless such son
“ shall attain the age of 21
“ years, or shall die under
“ that age, leaving issue of
“ his body living at his de-
“ cease, or born in due time
“ after; but nevertheless
“ the son so for the time
“ being entitled as afore-
“ said shall, after the death
“ of the said E. E., and
“ during such suspense of
“ absolute vesting as afore-
“ said, be entitled to the
“ rents, issues, and profits
“ of the same leasehold he-
“ reditaments for his own
“ use and benefit, subject
“ as aforesaid.”

ments so to be received in exchange as aforesaid, shall thereafter forthwith be settled, conveyed, and assured to, for, and upon, such uses, trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, conditions, and agreements, as are in and by these presents limited, expressed, declared, and contained, of and concerning the hereditaments hereby granted and released, or intended so to be, or as near thereto as the death of parties, and other contingencies, or the circumstances of the case, will then permit. Provided always, and it is hereby further declared and agreed by and between the said parties to these presents, that in the mean time and until the money to arise by such sale or sales, or to be received for equality of exchange as aforesaid, shall be laid out and invested in a purchase or purchases in the manner hereinbefore mentioned, it shall and may be lawful to and for the said B. B. and C. C. and the survivor of them, and the heirs of such survivor, by and with the consent and approbation of the said E. E. and I. T. or of the survivor of them, to be testified as last mentioned, and from and after the decease of such survivor, then by and of the proper authority of the said trustees or trustee for the time being, from time to time to place out and invest such sum or sums of money in the public stocks or funds of Great Britain, or at interest upon government or real secu-

Appendix,
No. VI.

Power of selling and exchanging.

(254.)

Appendix,
No. VI.

Power of sell-
ing and ex-
changing.

(255.)

rities in England or Wales; and from time to time, with such consent and approbation, and so testified as aforesaid, or of their or his own proper authority, as the case shall happen, to alter, vary, sell, transfer, and dispose of such stocks, funds, or securities, and lay out and invest the money arising by such alteration, sale, transfer, or disposition again, upon new or other stocks or funds, or at interest upon government or real securities of the like nature, as often as they shall think proper; and the interest, dividends, and annual proceeds arising from such stocks, funds, or securities, shall from time to time go and be paid to such person or persons, and be applied to such uses, intents, and purposes, and in such manner as the rents and profits of the hereditaments, to be purchased therewith, would go and be payable, or applicable, in case such purchase or purchases were actually made.

END OF THE FIRST VOLUME.

Printed by S. Gosnell, Little Queen Street, London.

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